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SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1964

No. 27

DORSEY K. OFFUTT, AN ATTORNEY, PETITIONER,

vs.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

PETITION FOR CERTIORARI FILED FEBRUARY 11, 1964.

CERTIORARI GRANTED APRIL 1, 1964

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,466

DORSEY K. OFFUTT, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court for the District
of Columbia

JOINT APPENDIX

PLEADINGS, DOCKET ENTRIES AND OTHER PAPERS

2035

Filed in Open Court Apr 4 1952

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

(Grand Jury Empaneled Jan. 2, 1952 and Sworn in
Jan. 3, 1952)

Criminal No. 579-52
Grand Jury No. Orig.
Abortion (22 D.C.C. 201)

THE UNITED STATES OF AMERICA

v.

HENRY L. PECKHAM, JR.

Indictment

The Grand Jury charges:

On or about May 2, 1951, within the District of Columbia, Henry L. Peckham, Junior, with intent to procure the miscarriage of Mary M. Ott, otherwise known as Mary Lee Ott, who was then pregnant, used upon her an instrument and means of a kind unknown to the Grand Jury, and administered to her medicine, drug and substance of a kind unknown to the Grand Jury.

SECOND COUNT:

On or about January 18, 1952, within the District of Columbia, Henry L. Peckham, Junior, with intent to procure the miscarriage of Mary M. Ott, otherwise known as Mary Lee Ott, who was then pregnant, used upon her an instrument and means of a kind unknown to the Grand Jury, and

administered to her medicine, drug and substance of a kind unknown to the Grand Jury.

CHARLES M. IRELAN

*Attorney of the United States in
and for the District of Columbia*

A TRUE BILL:

CHARLES A. LYONS

Foreman

2156

Criminal Docket

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PARTIES	ATTORNEYS	CRIMINAL NO.
UNITED STATES	U. S. Attorney	579-52
vs.		Charge:
HENRY L. PECKHAM, JR.	John J. Spriggs,	ABORTION
	Jr.	
	Dorsey K. Offutt Bond:	
	David L. Smith	1. \$3500.00
	Charlotte Maskey	M. E. O'Connor
	G. J. No. 1	g. 207

DATE PROCEEDINGS

1952

- Apr. 4 Presentment and Indictment filed (2 counts).
 10 Bond fixed by the Court at \$3500.00. LETTS, J.
 RECOGNIZANCE in the sum of \$3500.00 taken with
 M. E. O'Connor, Surety, filed.
 Apr. 11 ARRAIGNED, Plea NOT GUILTY entered;
 Defendant on bond:
 Attorney not present. YOUNGBAHL, J. Cert. filed.
 May 2 Referred for appointment of counsel. LETTS, J.
 5 Order appointing John J. Spriggs as counsel to
 defend, filed. LETTS, J.
 6 Appearance of John J. Spriggs, Jr., entered, filed.

- 16 Motion of defendant for the return of property seized and the suppressing of evidence, and points and authorities in support thereof, filed.
- 19 Motion of defendant for production of documents, filed.
- 22 Motion and Affidavit of defendant to dismiss the indictment, Motion for a bill of particulars, and Motion to require the Government to elect under which count of the indictment they will proceed, filed.
- 23 Motion for return of property argued and granted in part, Denied in part; Motion for suppression of evidence argued and taken under advisement; Motion for production of documents argued and denied; Praecipe entering the appearance of Dorsey Offutt, filed.

Attorney John Spriggs present. KEECH, J. Cert. filed.

2157 May 23 Motion of defendant for inspection and memorandum in support of motion for inspection, filed.

- 23 Notice of defendant to Court for an order allowing him to take the deposition of Mrs. Charles Hodges, and Points and Authorities in support of Notice, filed.

- 27 Empaneling of jury begun but not completed; Case respite until tomorrow morning at 11:30 A.M.

Motion of defendant for continuance heard and denied.

Attorneys John Spriggs and Dorsey Offutt present. HOLZGER, J. Cert. filed.

- 27 Motion of U. S. to quash subpoena and memorandum in support thereof, filed.

- 27 Affidavit of Henry L. Peckham, Jr., filed.
Memorandum in Support of Motion to Require
Election by Government of the Court it Intends
to Try. filed.
- 27 Motion for continuance, filed.
Motion to reconsider order denying motion for re-
turn of property and to suppress, filed.
- 28 Empaneling of the jury resumed; JURY SWORN:

Louis H. Aikens	Daniel Ezrin
Joseph Armistead	Lester Gaskins
Irvin Tarason	John V. Goodman
Mannie S. Schwartz	Elsie M. Holecek
Gladys G. Craig	Karl E. Krause
William R. Russell	Aubrey J. Kendall

It appearing to the Court that the trial is likely to
be a protracted one, the Court directs the call-
ing of two additional jurors to be sworn in as
alternate jurors; Alternate jurors sworn:

Joseph J. Werres Joseph H. Weimer

Case respited until tomorrow morning at 10:30
A.M.

Appearance John J. Spriggs, Jr., entered
withdrawn: FIAT—HOLTZOFF, J.

Attorneys John J. Spriggs and Dorsey Offutt
present. HOLTZOFF, J. Cert. filed.

- 28 Motion of defendant for mistrial, filed.
- 27 Order Granting motion to suppress in part and
denying in part the return of property and
further ordering that counsel for defendant be
permitted immediately to inspect and have pho-
tostats made of Items, No. 23, 24, 25, filed.
KEECH, J.
- 29 TRIAL RESUMED; Same Jury; Case respited until
Monday, June 2, 1952 at 10:30 A.M.
Attorney Dorsey Offutt present. HOLTZOFF,
J. Cert. filed.

- JUN. 2 TRIAL RESUMED, Same Jury; Case respited until tomorrow morning at 10:00 A.M.
Attorney Dorsey Offutt present. HOLTZOFF, J. Cert. filed.
- 2 Transcript of Proceedings, Vol. 2, Pages 18-77, filed.
- 3 TRIAL RESUMED, Same Jury; Case respited until tomorrow morning at 10:00 A.M.
Attorney Dorsey K. Offutt present. HOLTZOFF, J. Cert. filed.
- 3 Transcript of proceedings, Vol. 3, Pages 78-161, filed.
Transcript of proceedings, Pages 1-17, filed.
- 4 TRIAL RESUMED, Same Jury; Case respited until tomorrow morning at 10:00 A.M.
Attorney Dorsey K. Offutt present. HOLTZOFF, J. Cert. filed.
- 4 Motion of defendant for mistrial, filed.
- 5 TRIAL-RESUMED, Same Jury; Case respited until tomorrow morning at 11:30 A.M.
Attorney Dorsey K. Offutt present. HOLTZOFF, J. Cert. filed.
- 5 Motion of defendant for mistrial, filed.
- 6 TRIAL RESUMED, Same Jury; Case respited until Monday, June 9, 1952, at 10:00 A.M.
Attorney Dorsey K. Offutt present. HOLTZOFF, J. Cert. filed.
- 9 TRIAL RESUMED, Same Jury; Case respited until tomorrow morning at 10:00 A.M.
Attorney Dorsey K. Offutt present. HOLTZOFF, J. Cert. filed.
- 10 TRIAL RESUMED, Same Jury; Case respited until tomorrow morning at 10:00 A.M.
Attorneys Dorsey K. Offutt and Charlotte Maskey present. Appearance Charlotte Maskey as associate counsel for defendant entered, and filed. HOLTZOFF, J. Cert. filed.

- 11 TRIAL RESUMED, Same Jury, Case respited until tomorrow morning at 10:00 A.M.

Attorneys Dorsey K. Offutt and Charlotte Maskey present. HOLTZOFF, J. Cert. filed.

- 11 Motion for mistrial and stay of proceedings, filed.

- 12 TRIAL RESUMED, Same Jury; Case respited until tomorrow morning at 11:00 A.M.

Proffer of evidence by defendant, filed.

Attorneys Dorsey K. Offutt and Charlotte Maskey present. LAWS, C.J. Cert. filed.

- 2159 JUL 13 TRIAL RESUMED, Same Jury; Case respited until Monday Morning, June 16, 1952 at 10 A.M. Defendant's prayers (37) filed.

Attorneys Dorsey K. Offutt and Charlotte Maskey present. HOLTZOFF, J. Cert. filed.

- 16 TRIAL RESUMED, Same Jury; Two Alternate Jurors discharged; Order to provide food issued at 12:30; Order to provide food and transportation issued at 6:30.

~~VERDICT—GUILTY on count one; NOT GUILTY on count two;~~

Jury polled;

Defendant committed to District of Columbia Jail. Commitment issued.

Case referred to the Probation Officer of the Court.

~~Attorneys Dorsey K. Offutt and Charlotte Maskey present. HOLTZOFF, J. Cert. filed.~~

- 20 Transcript of Proceedings Mon., 6-16-52, Pages 1239-1273; May 27, 28, 29, June 2, 1952, Vol. A-1; Thurs., May 29, 1952, Vol. 2, Pages 18-77; (Filed 6-2-52); Wed., May 28, 1952, Pages 1-17 (Filed 6-3-52); Mon., 6-2-52, Vol. 3, Pages 78-161 (Filed 6-3-52); Tues., 6-3-52, Vol. A-4, Pages 161-A-161-E; Tues. 6-3-52, Vol. 4, Pages 162-260; Tues. 6-3-52, Pages 260-A-260-Z-53; Wed., 6-4-52, Pages 1-89-A; Wed., 6-4-52, Vol.

5, Pages 261-327; Thurs., 6-5-52, Pages 1-219; Fri., 6-6-52, Pages 220-342; Mon., 6-9-52, Pages 343-527; Tues., 6-10-52, Pages 528-714; Wed., 6-11-52, Pages 715-890; Thurs., 6-12, 1952, Pages 891-1119; Fri., 6-13-52, Pages 1120-1238, filed. (Court Copy)

- 21 Appearance David L. Smith entered, filed.
Motion of defendant to fix bail pending appeal, filed.

Motion for a judgment of acquittal notwithstanding the verdict or in the alternative for a new trial, filed.

Motion for an order directing the Clerk on the appeal to transmit the original exhibits to the U. S. Court of Appeals for the District of Columbia, filed.

- 25 Motion of defendant for a new trial heard and denied. Defendant remanded to the District of Columbia Jail.

Attorneys David Smith and Charlotte Maskey present. HOLZOFF, J. Cert. filed.

- 25 Motion of the defendant for an order requiring the return to the Clerk of this Court of exhibits identified at the trial for inclusion in the record on appeal, filed.

2160 Jun. 25 Supplemental grounds for motion for a judgment of acquittal notwithstanding the verdict or in the alternative for a new trial, filed.

- 26 Motion of defendant for new trial on the ground of newly discovered evidence, filed.

Jul. 9 SENTENCED to Imprisonment for a period of Twenty (20) months to Five (5) years; License to practice medicine revoked by the Court; Defendant remanded to the District of Columbia Jail.

Motion to fix bond pending appeal heard and denied.

Motion for order directing Clerk to transmit original exhibits to U. S. Court of Appeals heard and granted as to those exhibits admitted into evidence at the trial.

Motion for order requiring return to Clerk of exhibits identified at the trial for inclusion in record on appeal, heard and granted in part; Order to be submitted.

Attorneys David F. Smith, Charlotte Maskey, Dorsey Offutt present. Holtzoff, J. Cert. filed.

- 9 Notice of Appeal, filed. Clerk's Fee \$5.00 paid and credited to U. S.

Designation of Preliminary Record on Appeal, filed.

- 9 Judgment and commitment, filed. Holtzoff, J.

- 11 Memorandum opinion denying motion for a new trial (dated 6/25/52), filed. Holtzoff, J.

- 15 Order revoking license and registration of defendant as physician, filed. Holtzoff, J.

- 17 Transcript of proceedings, Monday, June 16, 1952, Pages 1238-A thru 1238-G-GG, 1239 thru 1268, 2368-A thru 1268-F, 1269 thru 1272, filed. (Clerk's Copy)

Transcript of proceedings, Wednesday, June 25, 1952, Pages 1-16, filed. (Clerk's copy.)

Errata Sheet Prepared by Judge Holtzoff, Certificate of Official Reporters, filed. (Clerk's Copy)

- 18 Transcript of proceedings, Dated May 26, 1952, Pages 1-5, filed.

Transcript of proceedings, Vol. A-1, Pages A-1, A-29, 17-A-23-A, 77-A, 77-K, dated May 27, 28, 29, 1952, filed. (D. A. Copy)

Transcript of proceedings, Wednesday, May 28, 1952, Pages 1-17, Vol. 2, Pages 18-77, Thursday, May 29, 1952; Vol. 3, Pages 78-161, Monday,

June 2, 1952; Vol. A-4, Pages 161-A-161-E,
 Tuesday, June 3, 1952; Vol. 4, Pages 162-260,
 Tuesday, June 3, 1952; Pages 260-A, 260-Z-53,
 Tuesday, June 3, 1952; Pages 1-89-A, Wednes-
 day, June 4, 1952; Vol. 5, Pages 261-327, June 4,
 1952; Pages 1-219, Thursday, June 5, 1952.
 Pages 220-342, Friday, June 6, 1952; Pages 343-
 527, Monday, June 9, 1952; Pages 528-714,
 Tuesday, June 10, 1952; Pages 715-890,
 Wednesday, June 11, 1952; Pages 891-1119,
 Thursday, June 12, 1952; Pages 1120-1238, Fri-
 day, June 13, 1952; Pages 1238-A thru 1238-
 GGG, 1239 thru 1268, 1268-A thru 1268-F, 1269
 thru 1272, Monday, June 16, 1952; Pages 1-16,
 Wednesday, June 25, 1952; Vol. 1, Pages 1-24,
 July 9, 1952.

Errata Sheet Prepared by Judge Holtzoff, Cer-
 tificate of Official Reporters, filed. (D. A. Copy)

- 18 Designation for a complete record, filed.
- 25 Counterdesignation of record, filed.
- 25 Transcript of Proceedings, July 9, 1952, Pages 1-
 24, filed. (Clks. Copy)
- 30 Certified copy of Order from U. S. Court of Ap-
 peals for the District of Columbia admitting
 defendant to bail in the sum of \$5,000.00, filed.

Aug. 6 Defendant's Exhibits filed for identification: D1,
 D6 (in 3 parts), D7 (2 parts), D 18A, D 18B,
 filed.

- 14 Defendant's Exhibits filed for identification: D11,
 D21, D22.

- 15 Motion of defendant to supplement and clarify
 the record, and telegrams (2), filed.

Order extending time within which to file rec-
 ord on appeal to the 31st day of October, 1951,
 filed. *BASTIAN, J.*

Appearance Albert J. Ahern, Jr., entered, filed.

- 16 Praecipe withdrawing appearance of David L. Smith, filed. MATTHEWS, J.
- Praecipe withdrawing appearance of Dorsey K. Offutt, filed. MATTHEWS, J.
- Praecipe withdrawing appearance of Charlotte Maskey, filed. MATTHEWS, J.

- 19 Defendant's Exhibit D 2, filed for identification.
- 20 Order directing the Clerk to secure the return of certain records marked for identification for inclusion in the record on appeal, filed. HOLT-ZOFF, J.

Defendant's exhibits for identification numbers 3, 10, 12, filed.

- 21 Motion of the defendant to supplement and clarify the record and telegrams heard, argued and denied.

Attorney Albert J. Ahern, Jr. present HOLT-ZOFF, J. Cert. filed. (Reporter—O'Neal)

- 22 Government exhibits 1, 1a, 1b, 2, 3, 4, 6a, 6b, 6c, 6d, 6e, 6f, 7a, 7b, 7c, 7d, 7e, 7f, filed.
- Defendant's exhibits 4, 5, 8, 13a, 13b, 17, 19, 20, filed.

2162 Aug. 29 Records of George A. Christianson from the D. C. Parole Board filed for inclusion in the record on appeal pursuant to order of August 20, 1952.

Sep. 5 Transcript for proceedings, May 23, 1952, Pages 1-92, filed. (Clerk's Copy)

Oct. 16 Motion to amend Order directing the Clerk to secure the return of certain records marked for identification for inclusion in the record on appeal, filed.

23 Additional Designation of Record, filed.

24 Motion to amend order directing Clerk to secure return of certain records marked for identification for inclusion in record on appeal argued and granted.

Attorney Albert J. Ahern, Jr. present. *HOLTZOFF, J.* Cert. filed. (Reporter—O'Neal)

- 30 Order extending time for filing record in U. S. Court of Appeals for the District of Columbia until November 15, 1952. *HOLTZOFF, J.* (N)

Attorney Albert J. Ahern, Jr. present.

Amended order directing Clerk to secure the return of certain records marked for identification for inclusion in the record on appeal, filed. *HOLTZOFF, J.* (N)

- Nov. 4 Transcript of proceedings May 23, 1952, Pages 1 to 92, filed.

Prepared for Mr. Ahern (Reporter—Mark walter)

- 5 Photostat copy of records of Bethesda Naval Medical Center pertaining to Mary N. Ott, filed and sealed per order entered herein October 30, 1952.

Photostat copy of Records of Mt. Alto Hospital pertaining to Mary N. Ott, filed and sealed per order of October 30, 1952.

Personal file of District of Columbia Jail pertaining to George A. Christianson, filed, per order of October 30, 1952.

- 14 Order directing Clerk of Court to transmit stenographic record to U. S. Court of Appeals provided defendant pays reporter the required fee. (Signed Nov. 13, 1953)

Order extending time for filing record in U. S. Court of Appeals until November 21, 1952. *HOLTZOFF, J.*

- 20 Order extending time within which to file record in U. S. Court of Appeals to December 1, 1952. *HOLTZOFF, J.*

- Dec. 15 Certified copy of Order from the U. S. Court of Appeals for the District of Columbia extending

time for filing the record on appeal to and including December 24, 1952, filed.

- Jan. 2 Transcript of proceedings, Pages 1 to 5, dated May 26, 1952 and pages 1 to 8, dated August 21, 1952, filed. (Attorneys' copy)
- 3 Certified copy of Order from U. S. Court of Appeals Extending Time for filing transcript of record to and including Jan. 15, 1953, filed.

1953

- Jan. 8 Certified copy of Order from U. S. Court of Appeals for the District of Columbia Granting that the stenographic transcript be treated as a part of the record. (Appeal No. 11487) In Case —Offutt v. U. S. Appeal No. 11466, filed.

1927

Criminal Docket

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PARTIES	ATTORNEYS	CRIMINAL NO.
UNITED STATES	U. S. Attorney	579-52
vs.	John J. Spriggs,	
HENRY L. PECKHAM, JR.	Jr.	Charge:
	Dorsey K. Offutt	ABORTION
	David L. Smith	Bond:
	Charlotte Maskey	1. \$3500.00
	G. J. No. Orig.	M. E. O'Connor

DATE

PROCEEDINGS

1952

- Apr. 4 Presentment and Indictment (2 counts)
- 10 Bond fixed by the Court at \$3500.00. LETTS, J. RECOGNIZANCE in the sum of \$3500.00 taken with M. E. O'Connor, Surety, filed.

- Apr. 11 ARRAIGNED, Plea NOT GUILTY entered; Defendant on bond; Attorney not present. YOUNGDAHL, J. Cert. filed.
- May 2 Referred for appointment of counsel. LETTS, J.
- 5 Order appointing John J. Spriggs as counsel to defend, filed. LETTS, J.
- 6 Appearance John J. Spriggs, Jr. entered, filed.
- 16 Motion of defendant for the return of property seized and the suppression of evidence, and points and authorities in support thereof, filed.
- 19 Motion of defendant for production of documents filed.
- 22 Motion and Affidavit of defendant to dismiss the indictment, Motion for a bill of particulars, and Motion to require the Government to elect under which count of the indictment they will proceed, filed.
- 23 Motion for return of property argued and granted in part; Denied in part.
 Motion for suppression of evidence argued and taken under advisement.
 Motion for production of documents argued and denied.
 Praecipe entering the appearance of Dorsey Offutt, filed.
 Attorney John Spriggs present. KEECH, J. Cert. filed.
- 1928 Jun. 2 Transcript of Proceedings, Vol. 2, pages 18-77, filed.
- 3 TRIAL RESUMED, Same Jury; Case respited until tomorrow morning at 10:00 A.M.
 Attorney Dorsey K. Offutt present. HOLT-ZOFF, J. Cert. filed.
- 3 Transcript of proceedings, Vol. 3, Pages 78-161, filed.
 Transcript of proceedings, Pages 1-17, filed.

- 4 TRIAL RESUMED, Same Jury; Case respited until tomorrow morning at 10:00 A.M.
Attorney Dorsey K. Offutt; present. HOLT-ZOFF, J. Cert. filed.
- 4 Motion of defendant for mistrial, filed.
- 5 TRIAL RESUMED, Same Jury; Case respited until tomorrow morning at 11:30 A.M.
Attorney Dorsey K. Offutt present. HOLT-ZOFF, J. Cert. filed.
- 5 Motion of defendant for mistrial, filed.
- 6 TRIAL RESUMED, Same Jury; Case respited until Monday, June 9, 1952 at 10:00 A.M.
Attorney Dorsey K. Offutt present. HOLT-ZOFF, J. Cert. filed.
- 9 TRIAL RESUMED, Same Jury; Case respited until tomorrow morning at 10:00 A.M.
Attorney Dorsey K. Offutt present. HOLT-ZOFF, J. Cert. filed.
- 10 TRIAL RESUMED, Same Jury; Case respited until tomorrow morning at 10:00 A.M.
Attorneys Dorsey K. Offutt and Charlotte Maskey present.
Appearance Charlotte Maskey as associate counsel for defendant entered, and filed.
HOLTZOFF, J. Cert. filed.
- 11 TRIAL RESUMED, Same Jury; Case respited until tomorrow morning at 10:00 A.M.
Attorneys Dorsey K. Offutt and Charlotte Maskey present. HOLTZOFF, J. Cert. filed.
- 11 Motion for mistrial and stay of proceedings, filed.
- 12 TRIAL RESUMED, Same Jury; Case respited until tomorrow morning at 11:00 A.M.
Proffer of evidence by defendant, filed.
Attorneys Dorsey K. Offutt and Charlotte Maskey present. Laws, C.J. Cert. filed.
- 1929 May 23 Motion of defendant for inspection and memorandum in support of motion for inspection, filed.

23 Notice of defendant to Court for an order allowing him to take the deposition of Mrs. Charles Hodges, and Points and Authorities in support of Notice, filed.

27 Empaneling of jury begun but not completed; Case respite until tomorrow morning at 11:30 A.M.

Motion of defendant for continuance heard and denied.

Attorneys John Spriggs and Dorsey Offutt present. HOLTZOFF, J. Cert. filed.

27 Motion of U. S. to quash subpoena and memorandum in support thereof, filed.

27 Affidavit of Henry L. Peckham, Jr., filed.
Memorandum in Support of Motion to Require Election by Government of the Court it Intends to Try, filed.

27 Motion for continuance, filed.

Motion to reconsider order denying motion for return of property and to suppress; filed.

28 Empaneling of the jury resumed; JURY SWORN:

Louis A. Aikens	Daniel Ezrin
Joseph Armstead	Lester Gaskins
Irvin Tarason	John V. Goodman
Mannie S. Schwartz	Elsie M. Holecek
Gladys G. Craig	Karl E. Krause
William R. Russell	Aubrey J. Kendall

It appearing to the Court that the trial is likely to be a protracted one, the Court directs the calling of two additional jurors to be sworn in as alternate jurors; Alternate jurors sworn:

Joseph J. Werres Joseph H. Weimer

Case respite until tomorrow morning at 10:30 A.M. Appearance John J. Spriggs, Jr. entered withdrawn; FIAT—HOLTZOFF, J.

Attorneys John J. Spriggs and Dorsey Offutt present. HOLTZOFF, J. Cert. filed.

28 Motion of defendant for mistrial, filed.

27 Order Granting motion to suppress in part and denying in part the return of property and further ordering that counsel for defendant be permitted immediately to inspect and have photostats made of Items, No. 23, 24, 25, filed. KEECH, J.

29 TRIAL RESUMED, Same Jury; Case respited until Monday, June 2, 1952 at 10:30 A.M.

Attorney Dorsey Offutt present. HOLTZOFF, J. Cert. filed.

Jun. 2 TRIAL RESUMED, Same Jury; Case respited until tomorrow morning at 10:00 A.M.

Attorney Dorsey Offutt present. HOLTZOFF, J. Cert. filed.

1930 Jun. 13 TRIAL RESUMED, Same Jury; Case respited until Monday Morning, June 16, 1952 at 10 A.M. Defendant's prayers (37) filed.

Attorneys Dorsey K. Offutt and Charlotte Maskey present. HOLTZOFF, J. Cert. filed.

16 TRIAL RESUMED, Same Jury; Two Alternate Jurors discharged; Order to provide food issued at 12:30; Order to provide food and transportation issued at 6:30.

VERDICT—GUILTY on count one; NOT GUILTY on count two; Jury polled; Defendant committed to District of Columbia Jail. Commitment issued. Case referred to the Probation Officer of the Court.

Attorneys Dorsey K. Offutt and Charlotte Maskey present. HOLTZOFF, J. Cert. filed.

20 Transcript of Proceedings Mon., 6-16-52, Page 1239-1273; May 27, 28, 29, June 2, 1952, Vol. A-1; Thurs., May 29, 1952, Vol. 2, Pages 18-77; (Filed 6-2-52); Wed., May 28, 1952, Pages 1-17

(Filed 6-3-52); Mon., 6-2-52, Vol. 3, Pages 78-161 (Filed 6-3-52); Tues., 6-3-52, Vol. A 4, Pages 161-A-161-E; Tues., 6-3-52, Vol. 4, Pages 162-260; Tues., 6-3-52, Pages 260-A-260-Z-53; Wed., 6-4-52, Pages 1-89-A; Wed., 6-4-52, Vol. 5, Pages 261-327; Thurs., 6-5-52, Pages 1-219; Fri., 6-6-52, Pages 220-342; Mon., 6-9-52, Pages 343-527; Tues., 6-10-52, Pages 528-715; Wed., 6-11-52, Pages 715-890; Thurs., 6-12, 1952, Pages 891-1119; Fri., 6-13-52, Pages 1120-1238, filed. (Court Copy)

- 21 Appearance David L. Smith entered, filed.
Motion of defendant to fix bail pending appeal, filed.

Motion for a judgment of acquittal notwithstanding the verdict or in the alternate for a new trial, filed.

Motion for an order directing the Clerk on the appeal to transmit the original exhibits to the U. S. Court of Appeals for the District of Columbia, filed.

- 25 Motion of defendant for a new trial heard and denied.

Defendant remanded to the District of Columbia Jail;

Attorneys David Smith and Charlotte Maskey present. HOLTZOFF, J. Cert. filed.

- 25 Motion of the defendant for an order requiring the return to the Clerk of this Court of exhibits identified at the trial for inclusion in the record on appeal, filed.

1931 Jun. 25 Supplemental grounds for motion for a judgment of acquittal notwithstanding the verdict or in the alternative for a new trial, filed.

- 26 Motion of defendant for new trial on the ground of newly discovered evidence, filed.

Jul. 9 SENTENCED to Imprisonment for a period of Twenty (20) months to Five (5) years; License to practice medicine revoked by the Court; Defendant remanded to the District of Columbia Jail.

Motion to fix bond pending appeal heard and denied.

Motion for order directing Clerk to transmit original exhibits to U. S. Court of Appeals heard and granted as to those exhibits admitted into evidence at the trial.

Motion for order requiring return to Clerk of exhibits identified at the trial for inclusion in record on appeal, heard and granted in part; Order to be submitted.

Attorneys David F. Smith, Charlotte Maskey, Dorsey Offutt present. HOLTZOFF, J. Cert. filed.

9 Notice of Appeal, filed. Clerk's Fee \$5.00 paid and credited to U. S.

Designation of Preliminary Record on Appeal, filed.

9 Judgment and commitment, filed. HOLTZOFF, J.

11 Memorandum opinion denying motion for a new trial (dated 6/25/52), filed. HOLTZOFF, J.

15 Order revoking license and registration of defendant as physician, filed. HOLTZOFF, J.

17 Transcript of proceedings, Monday, June 16, 1952, Pages 1238-A thru 1238-G-GG, 1239 thru 1268, 2368-A thru 1268-F, 1269 thru 1272, filed. (Clerk's Copy)

Transcript of proceedings, Wednesday, June 25, 1952, Pages 1-16, filed. (Clerk's Copy)

Errata Sheet Prepared by Judge Holtzoff, Certificate of Official Reporters, filed. (Clerk's Copy)

- 18 Transcript of proceedings, Dated May 26, 1952, Pages 1-5, filed.

Transcript of proceedings, Vol. A-1, Pages A-1, A-29, 17-A-23-A, 77-A, 77-K, dated May 27, 28, 29, 1952, filed. (D. A. Copy)

Transcript of proceedings, Wednesday, May 28, 1952, Pages 1-17, Vol. 2, Pages 18-77, Thursday, May 29, 1952; Vol. 3, Pages 78-161, Monday, June 2, 1952; Vol. A-4, Pages 161-A-161-E, Tuesday, June 3, 1952; Vol. 4, Pages 162-260, Tuesday, June 3, 1952; Pages 260-A, 260-Z-53, Tuesday, June 3, 1952; Pages 1-89A, Wednesday, June 4, 1952; Vol. 5, Pages 261-327, June 4, 1952; Pages 1-219, Thursday, June 5, 1952; Pages 220-342, Friday, June 6, 1952; Pages 343-527, Monday, June 9, 1952; Pages 528-714, Tuesday, June 10, 1952; Pages 715-890, Wednesday, June 11, 1952; Pages 891-1119, Thursday, June 12, 1952; Pages 1120-1238, Friday, June 13, 1952; Pages 1238-A thru 1238-GGG, 1239 thru 1268, 1268-A thru 1268-F, 1269 thru 1272, Monday, June 16, 1952; Pages 1-16, Wednesday, June 25, 1952; Vol. 1, Pages 1-24, July 9, 1952.

Errata Sheet Prepared by Judge Holtzoff, Certificate of Official Reporters, filed. (D. A. Copy)

- 18 Designation for a complete record, filed.
 25 Counterdesignation of record, filed.
 25 Transcript of proceedings, July 9, 1952, Pages 1-24, filed. (Clks. Copy)
 30 Certified copy of Order from U. S. Court of Appeals for the District of Columbia admitting defendant to bail in the sum of \$5,000.00, filed.

1934

Miscellaneous DocketDISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

No.	Parties	Action	Petitioner's Atty.
15-52	UNITED STATES OF AMERICA vs. DORSEY K. OFFUTT	Criminal Contempt	Respondent's Atty.
Date	Proceedings	Fees Total	
June 16 52	Order of Adjudication in Contempt	filed	
	Motion for bail pending appeal or stay of execution	filed	
	Motion for bail, etc. Denied	Holtzoff, J.	
	Notice of Appeal	filed	\$5.00
	Designation of Record	filed	
	Statement of Points	filed	
June 19	Certified copy of order of U. S. Court of Appeals for D. C. that appellant be ad- mitted to bail pending disposition of his appeal upon filing in this Court a bond in penal sum of \$500.00 or upon depositing with Clerk of U. S. District Court for D. C. \$500.00 cash or bonds or notes, and executing a bond for his appearance.	filed	
June 26 52	Additional statement of Points on Ap- peal by Dorsey K. Offutt; Ser. ack. 6-26-52	filed	
June 26 52-	Additional designation of record on ap- peal by deft. Ser. ack. 6-26-52		

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF
— DIVISION

Misc. No. 15-52—Criminal Contempt

UNITED STATES OF AMERICA

v.

DORSEY K. OFFUTT

Order of Adjudication in Contempt

Filed Jun 16 1952

1. Filed June 16, 1952
6. Finding of guilt June 16, 1952.
7. Judgment—(with term of sentence) or order—Imprisonment for a period of 10 days. Entered June 16, 1952.
8. Notice of appeal filed June 16, 1952.
Dated June 16, 1952.

Attest: HARRY M. HULL, *Clerk*

By: MARGARET L. BOSWELL,
Deputy Clerk

A TRUE COPY—

TEST:

HARRY M. HULL, *Clerk*

By: MARGARET L. BOSWELL,

Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 15-52—Criminal Contempt

UNITED STATES OF AMERICA

v.

DORSEY K. OFFUTT

Notice of Appeal

Filed Jun 16 1952

Name and address of appellant: Dorsey K. Offutt, 927 15th Street, N.W., Washington, D. C.

Name and address of appellant's attorney:

Offense: Criminal contempt under Rule 42(a) of Federal Rules of Criminal Procedure.

Concise statement of judgment or order:

On Monday, June 16, 1952, United States District Judge Alexander Holtzoff, pursuant to written specifications charging the appellant with criminal contempt entered its order June 16, 1952 and sentencing him to serve ten days in jail.

Name of institution where now confined: Custody U. S. Marshall or District Jail in the District of Columbia.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia from the above-stated judgment.

DATED: June 16, 1952.

DORSEY K. OFFUTT

Dorsey K. Offutt, *Appellant*

CERTIFICATE OF SERVICE

Service of the attached Notice of Appeal made this 16 day of June, 1952, on United States Attorney.

CHARLOTTE MASKEY
Attorney

Service acknowledged:

CHARLES M. IRELAN,
U. S. Atty.

6/16/52

A TRUE COPY—

TEST:

(SEAL) **HARRY M. HULL, Clerk**
By: **JAMES N. MENENDY**
Deputy Clerk

Subpoena to Testify

Filed Aug 14 1952

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 579-52

UNITED STATES OF AMERICA

v.

HARRY L. PECKHAM, JR.

To Mrs. Charles Hodges, 119 East 2nd St., Erie, Pennsylvania

You are hereby commanded to appear in the United States District Court for the District of Columbia at

Judge Holtzoff's Court in the
the U. S. District Court

in the city of Washington, D. C. on the 2nd day of June, 1952 at 9:30 o'clock A.M. to testify in the case of the United States v. Henry L. Peckham, Jr., and bring with you any and all letters and telegrams which you have received from

your daughter, Mary Lee Ott, since February 1951, particularly correspondence before and after May 2, 1951 and correspondence before and after January 18, 1952

This subpoena is issued on application of the defendant.

(SEAL)

HARRY M. HULL, *Clerk*
By RICHARD L. GREENER,
Deputy Clerk

May 29th, 1952.

DORSEY K. OFFUTT

Attorney for Defendant

927 15th St. N.W., Washington, D. C.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 15-52—Criminal Contempt

UNITED STATES OF AMERICA

v.

DORSEY K. OFFUTT

Order and Specifications
(Title supplied)

Filed June 16 1952

Pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure, I hereby certify that I saw and heard the contempts of court hereinafter described, and that they were committed by Dorsey K. Offutt in the actual presence of the court during the trial of a criminal proceeding before me entitled, *United States v. Henry L. Peckham, Jr.*, commencing May 27, 1952, and ending this day. Said Offutt was counsel for the defendant in that case.

I find that said Offutt was guilty of the following breaches of decorum and offensive, contumacious, and unethical conduct in open court during the trial; and that said

breaches and course of conduct constitute contempt of court. The transcript of proceedings at the trial is hereby made a part hereof by reference. The citations herein are to the transcript. They are intended to be illustrative and not exhaustive.

1. On numerous occasions, he made insolent, insulting and offensive remarks to the court, and was guilty of gross discourtesy to the court.

June 4, 1952, pp. 13, 16-17, 291, 297.

June 5, 1952, pp. 45, 138, 194.

June 6, 1952, pp. 235-236, 255-256.

June 9, 1952, pp. 403-404, 490.

June 10, 1952, pp. 538, 555, 586, 617, 631.

2. On numerous occasions, he persisted in repeating questions, previously excluded by the court, in order to evade the court's rulings, in spite of admonitions by the court to the contrary. Many of these questions were obviously intended to besmirch a witness.

June 3, 1952, pp. 189-191, 200-202, 225, 260-W, 260-Z-1.

June 4, 1952, pp. 21, 322-323.

June 5, 1952, pp. 25, 38, 52, 121, 161.

June 9, 1952, pp. 374, 382-383, 393-394, 402, 410-411, 462-463, 480, 482.

June 10, 1952, pp. 570, 576, 579, 586, 592, 594, 598, 683.

3. On numerous occasions he persisted in talking boisterously after the court had made a ruling, and failed to desist when ordered to do so by the court, at times even continuing to talk while the court was speaking.

June 4, 1952, pp. 302-307.

June 9, 1952, p. 442.

June 10, 1952, pp. 546, 556-557, 696.

4. On numerous occasions he used a boisterous, belligerent, discourteous and offensive tone of voice in addressing the court.

June 3, 1952, pp. 260-Z-33, 260-Z-37, 260-Z-47.

June 4, 1952, p. 297.

June 5, 1952, p. 148.

June 6, 1952, p. 227.

June 11, 1952, p. 759.

5. On several occasions, he made false statements to the court, which he could not help knowing to be untrue, particularly concerning what the court had done or said.

June 3, 1952, p. 260-Z-51: "Mr. Offutt—I wanted to go to the bathroom and you wouldn't let me go." This was a false statement.

June 4, 1952, p. 58.

June 5, 1952, p. 152.

6. On several occasions he asked of witnesses questions that were highly prejudicial to the witness and for which there was no foundation. Thus, he asked Mary Ott, the victim of the abortions charged against the defendant, "When were you arrested in this case?" As a matter of fact she never had been arrested and when called to account by the court, Offutt only answered that he had a right to enquire *whether* the witness had been arrested in this case.

June 2, 1952, pp. 99-101.

See also, June 5, 1952, p. 161.

7. He falsely indicated that he would show that the witness Mary Ott inserted a tube into her private organs in order to induce a miscarriage. He asked Dr. Kilpatrick of Mount Alto Hospital, on cross-examination, whether Mary Ott had used a tube on herself to induce a miscarriage, and the doctor replied that a tube had been inserted in her nose in connection with her treatment in the hospital.

8. On numerous occasions, he created a noise and commotion in the courtroom by boisterous interruptions

and irrelevant remarks, such as objecting to a quiet conversation between two spectators in the courtroom, one of whom had been a witness in the case.

June 4, 1952, pp. 10-11, 25-26.

June 5, 1952, pp. 18-20.

June 10, 1952, p. 599.

9. On several occasions he asked permission to recall a witness for the purpose of interrogating the witness concerning some specific matter, and then proceeded to attempt a general re-examination of the witness.
10. The court excluded any questions to the witness Ott concerning an alleged abortion which she was claimed to have attempted on herself in 1950, in view of the fact that the abortions charged in the indictment were alleged to have taken place in 1951 and 1952. Nevertheless, these questions were repeated several times during the trial, obviously in an attempt to blacken the witness's character.
June 5, 1952, pp. 54-56.
11. He abused the process of the court by issuing a subpoena *duces tecum* to the mother of Mary Ott, and compelled her to come here from Erie, Pennsylvania, pursuant to a subpoena; and by issuing a subpoena to one Donohower. When called as witnesses, he was unable to elicit any relevant testimony from either of them.
12. He constantly tried to create an episode that might lead the court to direct a mistrial.

Wherefore, it is hereby, this 16 day of June, 1952,

Ordered, Adjudged, and Decreed, that said Dorsey K. Offutt is guilty of criminal contempt of court as aforesaid, and that he be committed to the custody of the United

States Marshal for the District of Columbia, for a period of 10 days.

/s/ ALEXANDER HOLTZOFF,
United States District Judge

2048

Filed May 23 1952

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 579-52

UNITED STATES, *Plaintiff*

v.

HENRY L. PECKHAM, *Defendant*

Notice

TO: Arthur J. McLaughlin, Esq.
Asst. United States Attorney
Court House

Please take notice that on Thursday, May 29, 1952, at 10:00 A.M., the defendant will apply to the Court for an order allowing him to take the deposition of Mrs. Charles Hodges, at her residence, 119 E. 2nd Street, Erie, Pennsylvania, deposition to be taken at 2:00 P.M., on June 6, 1952.

DORSEY K. OFFUTT
927 15th St., N.W.,
Counsel for Defendant

2049

Filed May 23 1952

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 579-52

UNITED STATES, *Plaintiff*

v.

HENRY L. PECKHAM, *Defendant***Points and Authorities in Support of Notice**

Rule 15 (a) and (b), Federal Rules of Criminal Procedure.

Defendant's counsel, at oral argument, will state reasons which make the taking of this deposition indispensable for this defendant to safely go to trial.

DORSEY K. OFFUTT

927 15th St., N.W.,

Counsel for Defendant

2050

Filed May 27 1952

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 579-52

UNITED STATES OF AMERICA

v.

HENRY L. PECKHAM, JUNIOR

Motion for Continuance

Now comes the defendant by his attorney and moves the Court for a continuance in order to permit the defendant a reasonable length of time within which to prepare his defense on the following grounds:

1. After the appearance in court on Monday, May 26, 1952, the defendant's counsel made diligent effort to locate an affidavit of Mary Lee Ott which was said to have been executed and considered in connection with the issuance of the Commissioner's search warrant in this case. Said affidavit was not in the court file during the hearing on the Motion to Suppress which was heard before Judge Keech on Friday, May 23, 1952; and was not in the court file; efforts were made by attaches of the court in the criminal clerk's office and efforts were made to locate the said paper in the United States Commissioner's office but it could not be found. The hearing was reset until the following Monday, May 26, 1952, by the Court. After the Court had adjourned for the day, May, 23, defense counsel was advised by telephone at his office by the Court at about 5:15 P.M. that the affidavit had been found and the defendant's counsel had never seen the said affidavit; defendant was not served with a copy of the said affidavit and had never been informed of the alleged existence of said affidavit until the day of the hearing, May 23, 1952.

Defendant's counsel made a diligent effort to find said affidavit and could not locate the same until Judge Keech at 11:55 A.M. on Monday, May 26th, 1952, informed defendant's counsel, Mr. Spriggs and Mr. Offutt, of the whereabouts of said affidavit.

Upon examining the said affidavit, it was determined for the first time the identity of two witnesses, George A. Christenson and William E. Jones, who are essential to interview in order that the defendant be properly prepared to defend this case, and there are other facts which were 2051 divulged by this affidavit which must be examined.

Further, defendant's counsel, upon reliable information, believes that a witness, Mrs. Charles Hodges, the mother of Mary Lee Ott, who resides in Erie, Pennsylvania, has been in communication with her daughter by mail and telephone, and Mary Lee Ott has informed her mother that Dr. Peckham is not responsible for and did not commit this

illegal act upon her, and therefore, counsel desires to have the opportunity to subpoena for trial or to take the testimony of Mrs. Charles Hodges, and Mrs. Ava Yankowsky, a sister of the defendant, who likewise resides in Erie, Pennsylvania, and requires additional time in order to take the testimony of said witness.

DORSEY K. OFFUTT

Attorney for Defendant

927 15th Street, N.W.

Washington, D. C.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No 15-52

UNITED STATES OF AMERICA

v.

DORSEY K. OFFUTT

Motion for Bail Pending Appeal or Stay of Execution

Filed June 16 1952

Now comes Dorsey K. Offutt and moves this Honorable Court to admit him to bail in a reasonable amount from the conviction of criminal contempt on June 16, 1952 by District Judge Holtzoff sentencing him to ten days in the District Jail.

The grounds of the motion are:

1. Substantial questions of law and fact are involved.
2. An appeal will be taken in good faith.
3. Unless bail is granted, the issues will become moot as the sentence will be served before an appeal can be heard, thus rendering the right of appeal in this case futile.

4. And for other and further grounds apparent of record.

/s/ CHARLOTTE MASKEY
Charlotte Maskey
Attorney for Defendant
927 15th Street
Washington, D. C.

Copy acknowledged this 16th day of June, 1952.

CHARLES M. IRELAN
United States Attorney

June 16, 1952

DENIED. HOLZOFF, J.

A TRUE COPY—

TEST:

(SEAL) HARRY M. HULL, *Clerk*
By JAMES N. MENENDY
Deputy Clerk

2039

Filed May 22 1952

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
HOLDING A CRIMINAL TERM

Criminal No. 579-52

UNITED STATES OF AMERICA

v.

HENRY L. PECKHAM, JR.

Motion to Dismiss the Indictment

Now comes the defendant Henry L. Peckham, Jr., by his attorneys Dorsey K. Offutt and John J. Spriggs, Jr., and having withdrawn his plea of Not Guilty heretofore entered by permission of the Court, moves this Honorable Court to dismiss the indictment and each count thereof upon the following grounds:

1. The indictment and both counts thereof are bad in substance because neither count of the indictment contains any averment that this defendant, a duly licensed and practicing physician at all times mentioned in the indictment as is shown by the attached affidavit and as was well known to the United States Attorney for the District of Columbia long prior to the return of the indictment, performed an abortion upon Mary M. Ott which was not necessary to preserve her life and health.

2. Both counts of the indictment are defective as applied to a duly licensed and practicing physician for failure to allege an offense under the District of Columbia Code (1940) 22-201.

3. The indictment is defective because separate, distinct and unrelated offenses are joined in the same indictment.

4. And for other matters apparent on the face of the record and to be orally argued on the motion.

DORSEY K. OFFUTT

Dorsey K. Offutt

JOHN J. SPRIGGS, JR.

John J. Spriggs, Jr.

Attorneys for Defendant

927 15th Street, N.W.

Washington, D. C.

• • • • •

2042

Filed May 22 1952

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
HOLDING A CRIMINAL TERM

Criminal No. 579-52

UNITED STATES OF AMERICA

v.

HENRY L. PECKHAM, JR.

**Motion to Require the Government to Elect Under Which
Count of the Indictment They Will Proceed.**

Now comes the defendant, Henry L. Peckham, Jr., by his attorneys, Dorsey K. Offutt and John J. Spriggs, Jr., and moves this Honorable Court for an Order requiring the Government to elect on which count of the indictment they will proceed at the trial. The grounds of the motion are:

1. The indictment contains two counts alleging the commission of separate, distinct and unrelated offenses at widely separated periods of time. This defendant would be subjected to great prejudice if he were required to defend against both counts of the indictment in a single trial. Moreover, a requirement that the defendant defend against both counts at a single trial would inevitably tend to show that the defendant had committed an independent crime involved in either count.

2. And for other matters to be urged at the hearing.

DORSEY K. OFFUTT

Dorsey K. Offutt

JOHN J. SPRIGGS, JR.

John J. Spriggs, Jr.

Attorneys for Defendant

Henry L. Peckham, Jr.

927 15th Street, N.W.

Washington, D. C.

.

December 31, 1951

Miss Mary Lee Ott
3009 Que St. N.W.
Washington, D. C.

RE: CHRISTENSON, George
DCDC# 90746

Dear Miss Ott:

To aid us in assisting George during his stay here and to assist him when he is released, it is necessary for us to enlist the cooperation of those who know him best.

When our workers talked to him, he said you had lived with him in a Common-Law relationship. If this is correct, we would greatly appreciate your answering the following questions:

1. How long has this relationship existed?
2. How many children have been born to this relationship. What are their names and when and where were they born?
3. Was he married prior to the beginning of this relationship? If so, how was that marriage terminated?
4. Were you married prior to the beginning of this relationship? If so, how was that marriage terminated?
5. Do you expect to remain loyal to him during his absence?

All information received will be treated in a confidential manner. A self-addressed envelope is enclosed for your reply.

Very truly yours,

P. M. GRAFF
*Supervisor of
Classification*

April 30, 1952

Preparole**RE: CHRISTENSON, GEORGE A., #90746***Home and Family:*

Subject informed us in filing his application for parole that his plans for a home would be with his sister and her husband, Mr. and Mrs. William Sawn of 1803 37th Street, N. W. As our file will indicate, two attempts have been made to interview the Swan family but so far we have been unable to do so. Indirectly we are now informed by subject that Mrs. Swan has been called home to her parents in California for an unlimited visit because of the illness of her father whose death is expected momentarily.

We have been able to talk at some length with subject's girl friend, Miss Mary Lee Ott of 3009 Q Street, N.W. Miss Ott, youthful in appearance, is 24 years of age and is humble in her attitude toward this office, appearing embarrassed about her relationship with subject and repeatedly thanking us for receiving her as a human being who is doing her best to correct a big mistake.

Miss Ott met subject when both were employed at Woodward and Lothrop's of this city. They became close friends but could not be married because both had been married previously and had divorce proceedings pending at the time. However, as time went on they were lost in their own personal desire for each other and began living as man and wife. Miss Ott and subject lived together under his name at 2415 Pennsylvania Avenue, N.W., until subject was arrested.

Miss Ott, who is a native of Pennsylvania, was formerly married and has a daughter 20 months old. She described her marriage as an unfortunate venture which ended in divorce. Her child is with her parents in Pennsylvania. Her parents are unaware of her relationship with this man.

Miss Ott is presently employed by the U. S. Marine Corps as a typist. She has an average income comparable to those who work in this category.

Miss Ott described subject as a mild-mannered, even-tempered man who had been very considerate and kind to her even in sickness and had waited on her and was attentive in every respect. Subject drinks sociably but does not gamble. Miss Ott could not explain the cause of his actions other than perhaps he had obligations of which she had no knowledge which possibly could have led him into committing this offense. She admitted having access to extra money which subject offered her from time to time, but explained that she thought nothing of this because he had a hobby of writing short stories and was also quite capable in the field of photography. When he would offer her money, he always informed her that he had been able to sell a few short stories for publication in magazines, etc. Miss Ott denied having any knowledge of the true facts concerning the source of this extra money or taking any part in the obtaining of same.

Miss Ott displays a strong devotion for this subject and plans to marry him as soon as his divorce decree is final.

It would appear that subject has not yet decided what type of employment he wishes to follow, but Miss Ott has stated she will stick with him no matter what endeavor he may choose.

We also inquired of Miss Ott as to the present whereabouts of subject's sister, Mrs. Swan. She corroborates the statement of subject that due to illness of the father, she is in California for a visit of undetermined length. According to Miss Ott, the Swan home is open to subject whenever he is able to join them. The home is described as a large frame dwelling which is rented. Mr. and Mrs. Swan have no children and both are Federal Government workers. Miss Ott reports that a close friendly relationship exists between Mr. and Mrs. Swan and herself.

Police Record:

Police files indicate subject is commonly called "Chris." He frequents the 400 Club and Club Kavakos.

Filed Feb 19 1953

JANUARY TERM, 1953

No. 11,466

DORSEY K. OFFUTT, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

BEFORE: STEPHENS, Chief Judge, in Chambers.

Order

This case came on for consideration on appellant's motion for permission to print as part of the joint appendix herein portions of the record in case No. 11,487, Peckham v. United States, and on appellee's opposition thereto and on appellee's further pleading in which appellee withdrew its opposition to said motion except insofar as that opposition related to certain medical records which were sealed by order of the United States District Court. There was a conference between counsel before Chief Judge Stephens on February 16, 1953, at which time counsel for appellant stated, that, as on February 10, 1953, this Court entered an order denying appellant's motion to examine certain medical records pertaining to Mary M. Ott, counsel for appellant did not intend to print those exhibits.

Upon consideration whereof it is *ordered* that appellant, be, and he is hereby, allowed to print as a part of the joint appendix those portions of the record designated in appellant's designation of matter to be printed in the joint appendix, filed herein January 26, 1953, with the exception of two exhibits sealed by order of the United States District Court described as photostatic copy of medical

records of Mt. Alto Hospital pertaining to Mary M. Ott,
and photostatic copy of medical records of the Bethesda
Naval Medical Center pertaining to Mary M. Ott.

Dated: Feb 19 1953

Filed June 16, 1952

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1952

No. 11,466

DORSEY K. OFFUTT, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Before: Edgerton, Bazelon and Washington, Circuit
Judges, in Chambers.

Order

Upon consideration of appellant's motion for an order
admitting him to bail pending appeal, and

WHEREAS *Satcher v. United States*, 343 U. S. 1 contem-
plates that before a lawyer is punished for criminal con-
tempt he may have appeal on law and fact to the Court of
Appeals, it is

ORDERED by the Court that the appellant be, and he is
hereby, admitted to bail pending disposition of his appeal
herein upon his filing in this Court of a bond in the penal
sum of \$500.00 (Five Hundred Dollars) with surety to be
approved by the Clerk of this Court, or upon depositing
with the Clerk of the United States District Court for the
District of Columbia \$500.00 (Five Hundred Dollars) in
cash or bonds or notes of the United States, and executing
a bond for his appearance, pursuant to Rule 46(d) of Fed-
eral Rules of Criminal Procedure; appellant's bond to be
conditioned upon his surrendering himself forthwith to the

custody of the United States Marshal for the District of Columbia when properly called upon to do so, to be dealt with and proceeded against in his case according to law, in case the judgment appealed from in his case on appeal herein shall be affirmed, or the appeal be for any cause dismissed, or the judgment be reversed and a new trial ordered or a further order of this Court be entered revoking this order.

Dated:

Per Curiam.

II

EXCERPTS FROM TESTIMONY AND PROCEEDINGS

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 579-52

UNITED STATES

v.

HENRY L. PECKHAM, JR.

Washington, D. C.

Monday, May 26, 1952

As a preliminary matter, before Chief Judge BELITHA J. LAWS, at 10 a.m. today.

Appearances:

For the United States:

Mr. ARTHUR McLAUGHLIN

For the defendant:

Mr. DORSEY K. OFFUTT

PROCEEDINGS

Mr. Offutt. If Your Honor please, I was retained to represent Doctor Peckham in the case of United States versus Henry Lincoln Peckham. I entered my appearance on Thursday and we have two motions which were argued on Friday before Justice Keech. One of those was disposed of and another was disposed of after we left court and we haven't prepared the order, but we expect to present it today. There are three more motions pending, and the case has been set for Tuesday—tomorrow. I don't see how it conceivably can be set for Tuesday.

There is also notice to take testimony of a witness in Erie, Pennsylvania, on June 6—this coming Friday. We just learned about that witness last week, and as soon as I learned about it I filed a notice, which was on Friday. And therefore I don't see how we could conceivably have the case prepared for trial and have the motions disposed of inside of two weeks. What I ask Your Honor is a two-weeks continuance.

Mr. McLaughlin. This case came up a week ago last, I believe, Your Honor. There was a request for continuance at that time and Your Honor gave a continuance to Mr. Spriggs and said it was the last continuance in the case. We have these witnesses subpoenaed:

4 This defendant had appeared, I think, four or five different times in court and wanted to get an attorney, and Mr. Spriggs was appointed. And as Your Honor will recall, the case was set for the 20th, I believe. At that time a continuance was given the defendant because Mr. Spriggs had—I don't have a note of it here—but for some reason he said he wasn't prepared.

Mr. Spriggs' motions were set down for last Friday, and we argued them. And then Mr. Dorsey Offutt came in the case and several other motions have been filed in the meantime.

We had our witnesses subpoenaed for the last time and we have them subpoenaed for tomorrow. The Government opposes any continuance.

I might say further, as far as these continuances—and I say this in respect to everyone involved in the case—I don't know what the purpose of the continuances are. The witness that my friend has said he has discovered is the mother of the complaining witness. I don't know whether he is writing to her to intimidate my witness or not. I do have information that my complaining witness is receiving telephone calls in a threatening manner, allegedly from the attorney who represents the defendant and refuses to give his name. So I don't know whether these continuances are for that purpose or not.

The Government at this time opposes any continuance, Your Honor.

5 Mr. Offutt. Your Honor, I am a little surprised at the District Attorney saying his witness. I have never heard of a witness belonging to any party. That seems to be one of the criteria of the District Attorney and particularly of Mr. McLaughlin, that any witness he has the name of is his witness.

If the Court please, it just so happens that witnesses who are witnesses to an occurrence are witnesses available to either party; and it seems to me that it is very improper for a district attorney to tell a lawyer not to talk to any witness.

The Court. Do you have a statement as to what the witness will testify to?

Mr. Offutt. That isn't the principal reason I have asked for it.

The Court. I have asked you if you had it.

Mr. Offutt. No, Sir. She will not talk and refused to talk, because she said the District Attorney told her not to talk.

The Court. If you want her testimony, you can get a subpoena from the Court.

The continuance will be denied.

Mr. Offutt. I am going to take the subpoena of the Court, Your Honor.

The Court. I have ruled that the continuance will
6 be denied.

Mr. Offutt. All right, sir.

(Accordingly the instant proceedings were concluded.)

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8 May 27, 1952.

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15 The Court. I have them before me. There is a
motion for reconsideration of a motion decided by
16 Judge Keech. That, of course, is for Judge Keech,
but I am not going to continue this case because of
that motion.

Now I am denying all motions to continue, and we will
proceed to impanel the jury, gentlemen.

Mr. Offutt. Your Honor, I have other motions beside the
motion to continue. This is a two-count indictment, and
I call upon the Government to elect on which count of the
indictment they are proceeding.

The Court. The motion to elect must be brought up for
consideration after the jury is impaneled. I will hear you
on that motion after the jury is impaneled.

Mr. Offutt. Then there is another motion, Your Honor—
I know there is another motion but I can't remember the
name of it.

The Court. Any motion, other than motions to continue,
I shall hear after the jury is impaneled. I shall hear all
other motions after the jury is impaneled.

Mr. Offutt: I feel this is my duty to call this to Your
Honor's attention. Did you look at the affidavit in the file?

This motion of Judge Keech was based upon something
that the defendant never saw; the Judge obtained it after
the hearing.

The Court. I shall not consider it.

Mr. Offutt. We have never seen it until yesterday.

The Court. I am not going to consider anything that another Judge has considered. I think it would be discourteous to the other Judge.

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Thursday, May 29, 1952.

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Mary Millicent Ott.

was called as a witness by and on behalf of The United States, and being first duly sworn, was examined and testified as follows:

Direct Examination:

By Mr. McLaughlin:

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110 Q. After that December 9, 1952, did there come a time when you either saw or talked to the Defendant Peckham again?

111 Mr. Offutt. Your Honor, may I know whether that was December 9th?

Mr. McLaughlin. January 9th—pardon me. If I didn't have these interruptions, my mind might be a little more collected.

Mr. Offutt. I can't hear, because his back is to me.

The Court. Counsel has a right to examine a witness without any interruption, except for objections.

Mr. Offutt. But I want to hear; I have a right to hear, too.

The Court. Counsel has a right to hear. You may proceed.

Mr. Offutt. I want to hear.

The Court. I don't know why you cannot hear; the Court can hear.

Mr. Offutt. Judge, he doesn't have his back to you, like he does to me.

Mr. McLaughlin. May I say why that is, why I have my back toward him?

The Court. No, no.

Mr. McLaughlin. I do that because of fear.

Mr. Offutt. Fear?

Mr. McLaughlin. Yes.

Mr. Offutt. Now, Your Honor, I think that—

The Court. You may proceed.

112 Mr. Offutt. I would like to have him explain that.

The Court. No, no, no.

Mr. McLaughlin. Because he threatened to punch me in the nose.

Mr. Offutt. Now, did you hear what he said?

The Court. Now, just a moment. You may proceed, Mr. McLaughlin.

Now, you may change your seat, if you wish, Mr. Offutt, if you think you can hear better.

Mr. Offutt. All right, sir.

I request Your Honor to hear what he said, and I ask that that be stricken from the record, what he said.

The Court. All colloquy between counsel will be stricken from the record.

By Mr. McLaughlin:

Q. I believe my question was this:

After you left Defendant Peckham's house on that date, January 9, 1952, did there come a time, after that, when you either talked to him or saw him in person? A. Yes, sir. I saw him January 18th.

Q. January 18th? A. Yes, sir.

Q. Of 1952? A. Yes, sir.

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Monday, June 2, 1952.

PROCEEDINGS

The Deputy Court Clerk: The United States v. Henry L. Peckham, Jr.

Mr. Offutt: I would like to have two additional witnesses called to see if they are present in court, and have them sent to the witness room:

Mrs. Charles Hodges and Lieutenant Fred Donohower.

The Deputy Court Clerk: Is Mrs. Charles Hodges in the courtroom?

(No response.)

The Deputy Court Clerk: Lieutenant Fred Donohower. Is Lieutenant Fred Donohower in the courtroom?

(No response.)

Mr. Offutt: Those witnesses were served and told to be here and I would like a bench warrant issued.

Mr. McLaughlin: May we approach the bench on those witnesses, Your Honor?

The Court: Yes.

(Thereupon, counsel approached the bench and conferred with the Court, in a low tone of voice, as follows:)

The Court: You can make the check during the luncheon recess.

Mr. Offutt: Apparently he knows something about them.

Mr. McLaughlin: With respect to this witness, Lieutenant Donohower, he came up to me and said that Mr. Offutt asked him last Friday if he knew anything about the girl, and Offutt said, "If you don't talk to me I am going to subpoena you."

I understand this officer is going in training some place for the next two or three days and it is going to be rather detrimental; I think we ought to know what he intends to prove by this officer. The officer is here.

The Court: Why do you hold him?

Mr. Offutt: If Your Honor please, this man—I was informed this man has been going with the complaining witness in this case, and upon my investigation I found him in company with this lady in an officers club.

I also have other information. As a matter of fact this lady was in the quarters of this man at 1018 O Street, Northwest—

The Court: How is it revelant?

Mr. Offutt: They have been talking to each other and discussing this case, and since this time this futher information has come to me. I subpoenaed the witness because Judge Laws suggested that I use the process of this Court.

The Court: Just a moment. We will talk about one matter at a time.

Mr. Offutt: That's what I am going to—

The Court: (Interposing): No, you will answer my question directly. How is that matter revelant to the issues of this case? The fact that the complaining witness has been intimate with other men is not revelant.

Mr. Offutt: That is not the purpose of it.

The Court: What is the purpose?

Mr. Offutt: This woman discussed this case with Lieutenant Donohower. He is a lawyer and she has gone into the details of it and gotten his advice, and she has told him about this case. He is not acting as a lawyer but as a friend.

The Court: What do you want to elicit from him?

Mr. Offutt: I want to find out what he knows about it.

The Court: What do you want to elicit?

Mr. Offutt: Whether she has told him about the facts in this case, and if it is not a fact that she told him Dr. Peckham did not do it and has given him the name of the man who did do it.

Mr. McLaughlin: He has told this witness himself—this witness said, "I don't know anything about it;" and he said, "Well, I am going to subpoena you if you don't talk."

Mr. Offutt: That is not a fact.

Mr. McLaughlin: And also, as far as the complaining witness' mother, Mrs. Hodges, he is just subpoenaing her down here for spite.

The Court: Defense counsel has a right to subpoena any witness and I am not going to rule in advance that a witness may not be subpoenaed.

132 Mr. McLaughlin: No, but the Lieutenant just came to me and asked me if I would ask the Court.

The Court: I cannot help that; he is under subpoena, and if it turns out that Mr. Offutt has abused the process of the Court, then Mr. Offutt is answerable in a procedure for punishment of contempt, but I am not going to deprive him of the opportunity of securing any witness.

Mr. Offutt: I assure you it is in good faith.

The Court: Well, it better be.

Mr. Offutt: Your Honor, this Mrs. Hodges, this is the mother of the complaining witness—

The Court: What do you want?

Mr. Offutt: I don't want to embarrass this lady, but I issued a subpoena duces tecum for her to produce letters between this woman and herself.

The Court: I will take that matter up when you call the witness.

Mr. Offutt: She is somewhere in this courthouse; I think she is in the corridor.

The Court: What do you want me to do?

Mr. Offutt: I want to put her in the witness room so she isn't circulating around.

The Court: If she comes in the court after the rule on witnesses is announced, she is subject to contempt. I have no right to confine witnesses in the witness room.

133 The witness room is for their convenience. All I do is exclude them from the courtroom.

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Monday, June 2, 1952.

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155 Cross-Examination

By Mr. Offutt:

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Q. You are employed, are you not, at the Marine
156 Corps Headquarters, Enlisting Division? A. Do I
have to answer these questions?

The Court: Yes; you have to answer where you are employed.

A. Recruiting Aid Section, Headquarters, Marine Corps,
Room 1313 Navy Annex, Arlington, Virginia.

Q. How old are you? A. Twenty-six.

Q. Before you testified and took the stand, you talked
with Mr. McLaughlin, did you not? A. When do you mean,
sir?

Q. At sometime prior to taking the stand in this case, you
talked to Mr. McLaughlin, did you not? A. Yes, sir.

Q. And this gentleman you refer to as George A. Chris-
tianson, you also talked to him, in the presence of Mr. Mc-
Laughlin, before you took the stand in this case, did you
not? A. Yes, sir.

Q. By the way, when were you first arrested in connec-
tion with this case?

Mr. McLaughlin: I object to this, if Your Honor please.
There is no such thing as an arrest in this case, as far as
this girl is concerned, and he knows the law, and he knows
it is incompetent.

Mr. Offutt: I do not know.

157 Mr. McLaughlin: I object, Your Honor.

The Court: Will counsel come to the bench.

Mr. McLaughlin: If he doesn't know it, he should.

Mr. Offutt: Now, I object to his statement, Your Honor.

The Court: Come to the bench, gentlemen.

(Thereupon counsel approached the bench and conferred with the Court, in a low tone of voice, as follows:)

The Court: Just what is the meaning of the question, Mr. Offutt, about the witness being arrested?

Mr. Offutt: I want to know when she was arrested.

The Court: Well, was she arrested?

Mr. McLaughlin: Never.

Mr. Offutt: I will ask her that question.

The Court: You had no right to say when she was arrested.

Mr. Offutt: I have no right to inquire into whether she was arrested?

The Court: You did not ask her that. You asked when she was arrested.

Mr. Offutt: That's right.

The Court: That assumes that she was.

I am going to make a statement before the jury
158 that that is an improper question.

Mr. Offutt: I want to ask if she was arrested.

Mr. McLaughlin: They couldn't arrest her.

Mr. Offutt: They certainly could.

The Court: Well, did they?

Mr. McLaughlin: No.

The Court: Don't you know?

Mr. Offutt: The officers won't talk to me. Mr. McLaughlin told them not to talk to me.

The Court: I think that was quite proper, but you could ask Mr. McLaughlin.

Mr. Offutt: I will put him on the stand and ask him.

The Court: Why would they arrest her?

Mr. Offutt: Because of a number of things.

The Court: On what charge?

Mr. Offutt: They could arrest her on adultery; they could arrest her on fornication—

The Court: That's silly.

Mr. Offutt: Is it silly?

The Court: Yes.

Mr. Offutt: They could arrest her in connection with a conspiracy; they could—

The Court: Go back to counsel table, gentlemen.

(Thereupon counsel resumed their places at the trial table, and the following proceedings were had in open court:)

The Court: The question asked by counsel as to when she was arrested is improper, because it implies that she was arrested. There is no evidence that she was arrested.

Were you ever arrested in connection with this case?

The Witness: No, sir.

The Court: The question was highly improper.

You may proceed.

By Mr. Offutt:

Q. When were you first contacted by any police in this case? A. While I was in the hospital.

Q. Did you make a complaint, yourself, of any kind? A. I made a statement.

Q. When did you make—did you make a complaint to anyone before that time? A. I told someone what had happened to me.

Q. What was the first date that you told someone what happened to you, as you put it? A. I believe it was the day I was brought in the hospital.

Q. Whom did you tell on that date? A. I told that to a doctor.

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Tuesday, June 3, 1952.

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The Court: Will you have Mr. Offutt called in the lobby, please?

(Thereafter, and at 10:10 o'clock a. m., Mr. Dorsey K. Offutt entered the courtroom.)

Mr. Offutt: I want to apologize for being late. I think I had a little too much outing yesterday and I am a little ill. I may have to leave.

The Court: No. You have to be here on time.

Mr. Offutt: I have been on time every other time, Your Honor. I just had too much outing yesterday.

The Court: You had too much what?

Mr. Offutt: I had a lot of food and too much—things at the outing, and I am feeling—

The Court: But that is no excuse. Will counsel please come to the bench?

Mr. Offutt: That is the only excuse I have, Your Honor.

(Thereupon, counsel approached the bench and conferred with the Court, in a low tone of voice, as follows:)

The Court: You held up the trial eleven minutes by your tardiness. You are fined \$10 for contempt of court; the fine to be enforced after the conclusion of this trial.

Mr. Offutt: May I tell Your Honor what the reason is? I have what they think may be diverticulitis, and I thought I was over it. It is a condition which causes abdominal pain.

227

Mary Millicent Ott.

resumed the witness stand and being previously duly sworn, was examined and testified further as follows:

Cross Examination (Resumed):

223

The Court: If this is not repeated I will suspend the fine at the end of the trial.

251

Q. You testified that you told the doctor that George had said that he didn't want anything done with it, didn't you, on that occasion? A. Yes, sir.

Q. And yet he went with you to the Miami—somewhere—did you say "Miami?" A. Miami.

Q. Where is that located? A. On George Avenue.

252 Q. Georgia Avenue and what? A. It is practically opposite Princeton Place; I don't know the exact street there, on the other side. I think the street has a different name on the other side.

Q. Did you go in there, too? A. I don't recall whether I entered the place with him or not.

Q. Had George said that he didn't want you to go through with it? A. Yes, sir.

Q. Why did he go up to the Miami Grille with you, then?

Mr. McLaughlin: I object to this.

The Court: Objection sustained.

By Mr. Offutt:

Q. Did he know you were going to see Dr. Peckham? A. Yes, sir.

Q. And what did he say when you told him you were going to see Dr. Peckham? A. He begged me not to go.

The Court: Just a moment. I am going to exclude what George Christianson said. That has nothing to do with this case, at this stage of the case.

Mr. Offutt: That was testified to on direct.

Mr. McLaughlin: I object to his comment.

The Court: I will exclude that.

253 Mr. Offutt: All right, Your Honor. May I have an objection for the record to pursuing that?

The Court: Yes.

By Mr. Offutt:

Q. Had George told you that he objected to it?

Mr. McLaughlin: That is the same thing, Your Honor.

The Court: I told you, Mr. Offutt, that I shall exclude anything that George Christianson said to this witness because that is not proper cross examination.

Mr. Offutt: I am not going to ask her what he said, Your Honor: I am just going to refer to the objection, that's all, not the conversation.

The Court: That is another way of getting around my ruling.

Mr. Offutt: She has already said that on direct examination, Your Honor.

The Court: You may proceed, Mr. Offutt. I have made my ruling and you have to comply with it.

Mr. Offutt: I can't ask any—you said that—so that I will be clear about it, I can't ask any—

The Court: Any statements made by George Christianson to this witness are not proper cross examination, and I will exclude them at this time.

Mr. Offutt: All right.

By Mr. Offutt:

Q. You said that George objected to it. When did
254 he object to it? Give us the date.

Mr. McLaughlin: Now, he is right back again, Your Honor.

Mr. Offutt: I don't want the conversation.

The Court: Now, Mr. Offutt—

Mr. Offutt: I misunderstood Your Honor's ruling—

The Court: No, I think you understood.

Mr. Offutt: I did not, I give you my word of honor.

The Court: You can't be as stupid as all that. Do not transgress my ruling again.

Proceed and ask another question.

Mr. Offutt: All right.

By Mr. Offutt:

Q. When is the last time you saw and talked to George Christianson before today?

Mr. McLaughlin: I can't see the materiality of that, Your Honor.

The Court: No, I think that is proper.

A. I usually see him on Saturdays.

By Mr. Offutt:

Q. When is the last time you saw him before today? A. It was the day before I went on the witness stand, but I don't remember whether that was—was that last Wednesday, I believe. I couldn't say exactly what day it was.

Q. You said you usually see him on Saturday. Did
255 you see him Saturday before that? A. I didn't visit him this past Saturday, no.

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262 Q. Was Mr. Christianson with you that time? A.
263 Do you mean was he present with me in the house?

Q. Did he go along with you part of the visit, part of the trip, at that time? A. I have already told you he was in the Miami Grille on Georgia Avenue.

Q. That was the time you went back for the second time, wasn't it?

The Court: Now, you have been all over this. I am not going to permit you to go over the same ground more than once.

Mr. Offutt: I haven't been over the third trip, the one she is talking about now.

The Court: You have been over that.

Mr. Offutt: This is another question.

The Witness: You just asked me when we decided on the money.

Mr. Offutt: Just a moment. Listen to that, Your Honor. I ask you to admonish the witness.

The Court: Just a moment. You have no right to address the Court that way. You have no right to say to the Court, "Listen to that, Your Honor."

Mr. Offutt: I didn't say that.

The Court: Yes, you did.

Mr. Offutt: Oh, I beg your pardon.

The Court: Ask the next question, but don't go over the same ground.

264 By Mr. Offutt:

Q. On the trip that you went back and had the \$80, that was the third trip, wasn't it? A. No, sir. When I had the \$80 it was the day before he did the abortion.

Q. Wasn't that the day you said Mr. Christianson went to the Miami Grille? A. Yes, sir.

Q. Mr. Christianson was still working at the Riggs Bank then, wasn't he?

Mr. McLaughlin: I object to this.

The Court: Objection sustained. I told you that you may not inquire concerning Mr. Christianson's activities on the cross examination of this witness. If Mr. Christianson should be a witness, then you may cross examine him as to his activities, but you may not cross examine this witness.

Mr. Offutt: Can't I ask her what time—

The Court: No. Ask the next question.

Mr. Offutt: May I come to the bench—

The Court: No. Ask the next question.

Mr. Offutt: Your Honor, I wish you would let me come to the bench a moment so I can get myself straight on your ruling.

The Court: I have stated the rules—

Mr. Offutt (interposing): All right.

— The Court (continuing): —as to cross examination
265 tion just a moment ago, and they are elementary rules. You are an experienced lawyer and I am sure you are familiar with them. Proceed, please. They are not any abstruse principles. You may proceed.

By Mr. Offutt:

Q. Now, you came back on the next day, you say, after that and had the abortion performed, is that right? A. The day after I went and told him I only had \$80, yes, sir.

Q. And when you came back that day you say you only had \$100, is that right? A. That is right.

Q. Where did you get the other \$20?

The Court: I think that is immaterial. I do not think the witness should answer that. You may answer if you want to, but you do not have to.

A. Well, I am not sure. I think that—I don't remember if I borrowed it from somebody at work or I borrowed it from George, but I borrowed it from somebody.

286 Q. Didn't you discuss this case since Thursday, with Mr. Ernst, I think you said, Lieutenant Ernst, of the Sex Squad? A. I haven't discussed this case, no.

Q. Didn't you testify yesterday that you talked to Lieutenant Ernst and told him that I was following you and harassing you?

The Court: Now, she testified to that yesterday—

Mr. Offutt (Interposing): All right.

287 The Court (Continuing): —and I am not going to permit the question to be reopened, because that subject has been exhausted, and that is not inconsistent with her saying that she didn't discuss this case.

Mr. McLaughlin: Absolutely.

Mr. Offutt: I want to ask her about a—

The Court: You may not ask her that question. I am not going to permit that subject to be reopened.

By Mr. Offutt:

Q. Didn't you tell him some of the facts in this case—Lieutenant Ernst? A. No, sir.

Q. Did you tell him what the case was about? A. I hardly think that would have been necessary.

Mr. Offutt: Can I have an answer to the question?

The Court: I think that is a very good answer.

Mr. Offutt: I think it is, too, but it is not responsive. May I have the question, Your Honor? I am sure I didn't answer it? Very well.

By Mr. Offutt:

Q. Did anyone else discuss the facts, any of the facts, in this case with Lieutenant Ernst, to your knowledge?

Mr. McLaughlin: I object to this, Your Honor.

The Court: Objection sustained.

288 By Mr. Offutt:

Q. Didn't Lieutenant Ernst call somebody, in your presence, and ask about this case, when you went to see him?

Mr. McLaughlin: I object to this.

The Court: Objection sustained.

Now, I told you that I will not permit another question asked about that conference because you exhausted the entire field yesterday, and I suggest to you that you must not transgress my ruling.

Mr. Offutt: All right, sir.

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347 Q. Isn't it a fact that the first time Dr. Kilpatrick saw you, he was alone; Dr. Sabin was not with him?

348 A. I don't know. I think that Dr. Sabin came in with him, though.

Q. See if this refreshes your recollection. Wasn't it on the second time, the day after Dr. Kilpatrick saw you the first time, when Dr. Kilpatrick came back Dr. Sabin was with him? A. I don't remember exactly what day it was, sir.

Q. Isn't it a fact that when you first went in you just had a slight vaginal bleeding, instead of as you stated? A. In my opinion I wouldn't say it was so slight.

Q. After Dr. Kilpatrick had seen you, and Dr. Sabin, didn't you endeavor to cause the abortion—cause this abortion to be complete, by withdrawing and inserting a catheter that they had put in your? A. No, sir.

Q. And didn't you go into a tantrum, in that hospital, because they objected to your withdrawing and inserting a catheter in your vagina? A. No, sir.

Q. Do you deny that you did withdraw and insert the catheter in yourself? A. I don't even remember a catheter being used.

The Court: Will counsel come to the bench?

(Thereupon, counsel approached the bench and conferred with the Court, in a low tone of voice, as follows:)

349 The Court: Mr. Offutt, have you any basis for these questions which contain serious insinuations?

Mr. Offutt: Yes, sir.

The Court: What is the basis?

Mr. Offutt: I talked to the doctor.

The Court: Which doctor?

Mr. Offutt: Dr. Kilpatrick; he is the doctor who said he was on the case, and then afterward he said he didn't want to talk to me.

The Court: Did you get information from Dr. Kilpatrick?

Mr. Offutt: Yes, sir, information that she went into a tantrum—

The Court: Did Dr. Kilpatrick tell you that?

Mr. Offutt: Yes, sir.

The Court: Did he give you that information?

Mr. Offutt: Yes, sir. I might say I used the word "catheter." I would like to correct that; it says "levin tube," may I correct that?

The Court: Yes, you may do so.

Have you talked to Dr. Kilpatrick?

Mr. McLaughlin: No, I haven't, but I have him under subpoena.

The Court: I want you to talk to him, because I want to know if there is any basis for these questions, because I think counsel should not ask such questions unless
350 they have a reasonable basis for them.

Mr. Offutt: Your Honor, I might say that I recall that the hospital records had something about it, too, and they are here, if you would like to look at them.

Mr. McLaughlin: I will talk to Dr. Kilpatrick tonight; I will call him.

The Court: While these questions are admissible under the law of evidence, each of them contains an insinuation which should not be made unless counsel has a basis which would justify him in doing so.

Mr. Offutt: Your Honor, while I am up here, so that I won't overstep Your Honor's ruling, can I ask whether or not if she did not attempt to cause an abortion on herself?

The Court: I thought you did.

Mr. Offutt: No, I have not—another time before this.

The Court: Not in this case?

Mr. Offutt: Show the jury that she knows how to do it and she has attempted it.

The Court: No.

Mr. Offutt: I can show that she was put in a psychiatric ward at the Bethesda Hospital.

The Court: The fact that she tried an abortion on another occasion is not admissible. It is no more admissible than to show that Dr. Peckham has been indicted in other cases, which I would not permit, either.

351 Mr. Offutt: We have that in this case, one in May and one in January.

The Court: However, I do think the fact that a witness has been a patient in a psychiatric ward is admissible, because that goes to mental capacity to testify.

Mr. McLaughlin: As to her mental condition?

The Court: Yes. For instance, suppose a person is a discharged patient from St. Elizabeth's Hospital, I think that goes to a person's credibility. I will allow it.

In other words I will allow you to inquire whether she has been a patient in a psychiatric ward, but I want to warn you, you must have a basis for that question.

Mr. Offutt: That is in the Naval Hospital records, as I remember them.

The Court: You may inquire into that, but you may not inquire into any attempt at a prior abortion.

(Thereupon, counsel resumed their places at the counsel table and the following proceedings were had in open court:)

Mr. Offutt: Your Honor, may I have the previous question and answer read?

The Court: Yes, indeed.

The Reporter (Reading):

"Do you deny that you did withdraw and insert a catheter in yourself?

352 "Answer: I don't even remember a catheter being used."

Mr. Offutt: May I change that to "tube?" I made a mistake in so characterizing it.

The Court: Yes, you may.

By Mr. Offutt:

Q. And I will ask you the question again, isn't it a fact you did withdraw and insert, reinsert a tube within yourself while you were in Mount Alto Hospital, trying to bring about an abortion? A. No, sir. ✓

Q. Didn't you withdraw and insert the tube repeatedly while you were in there? A. No, sir.

Q. Isn't it a fact that you withdrew and reinserted the tube so much that they didn't reinsert it for a day?

The Court: Just a moment. You have asked that question twice and I will not permit it the third time.

By Mr. Offutt:

Q. Mrs. Ott, didn't you tell Dr. Kilpatrick—

The Court: I suggested once before that name is accented on the second syllable and not on the first syllable.

Mr. Offutt: Oh, yes, I beg your pardon—Dr. Kilpatrick.

By Mr. Offutt:

Q. Did you tell Dr. Kilpatrick that the discharge—
353 which you had from your vagina was more than the

usual discharge, when he examined you? A. I doubt that, because I was bleeding.

* * * * *

359 Mr. McLaughlin: I can't see the materiality, Your Honor please. If he is claiming the statement was taken under unusual circumstances, now he wants to use it to impeach the witness.

Mr. Offutt: I haven't had an opportunity to examine this statement.

The Court: I have told you that if after you have seen this statement you desire to do so I will permit you to recall this witness for further cross-examination, solely for the purpose of confronting her with any contradictory statement contained in that statement given to the police, but otherwise I think this cross-examination should be concluded pretty promptly. It started at a quarter of twelve yesterday.

Mr. Offutt: Your Honor, I have to look at the statement later.

The Court: You may look at the statement later, and I told you that I would permit this witness to be recalled for that one limited purpose, if you desire to do so after seeing the statement.

By Mr. Offutt:

Q. Now, you correspond back and forth with your mother, do you not?

The Court: I am going to exclude that.

Mr. McLaughlin: I object to that, Your Honor.

Mr. Offutt: All right.

360 The Court: That has nothing to do with the case.

It has no bearing on anything brought out on direct examination.

If you wish to confront her with any letters she may have written, you may do so, but generally I will not permit an exploratory expedition, so to speak, into what her relations are with her mother.

Mr. Offutt: I can't do that until I get the subpoena, Your Honor. The witness is here.

The Court: I will exclude that question.

By Mr. Offutt:

Q. Have you ever, Mrs. Ott, confronted Dr. Peckham, since January 18th and accused him, to his face, of performing this abortion?

The Court: I am going to exclude that because—

Mr. McLaughlin (Interposing): She has no control over that.

The Court (Continuing): —victims of an offense do not have to confront the person who committed the offense.

Mr. McLaughlin: She has no control over that.

By Mr. Offutt:

Q. Did you ever call up Dr. Peckham, since this happened, January 18th? A. No, sir.

Q. Have you called up Dr. Peckham since this trial
361 started? A. I have never called Dr. Peckham since it started.

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366 Mr. Offutt: She said I threatened her.

The Court: Suppose we let it go at that, that you told her there would be publicity if the case went to trial. I don't think she used the word "threatened."

Mr. Offutt: Oh, yes, I have got it here.

The Court: "Threat" is a characterization, I think.

Mr. McLaughlin: If Your Honor recalls, if he goes into that, Your Honor cut me off the last time, and if he wants to go into it I have something more to go into.

The Court: I think the details of that conversation are not too important, gentlemen. The only thing that is important is whether there was a telephone call from someone representing the defendant, indicating to this witness that if the case went to trial she would be embarrassed by un-

pleasantness, and that's all. As to how it was said, or what words were used, is immaterial.

Mr. Offutt: Your Honor please, my position is that he opened the door and I am entitled to go into it.

367 The Court: Yes, but—

Mr. McLaughlin: Let him, Your Honor; I am willing to let him go as far as he wants on this, because I have some questions to bring out.

Mr. Offutt: Of course it is my position that I objected, Your Honor, because it wasn't proper in the first place, and I still object.

The Court: I am going to allow you to do that, but I am not going to let you read all of those three or four or five pages you have there.

Mr. Offutt: I don't intend to do that, Your Honor.

The Court: But only those matters that bear on the particular subject touched on by this witness in her direct examination.

We will give the jury a short respite at this time.

(Thereupon, a short recess was taken, after which the following occurred:)

The Court: Will counsel come to the bench?

(Thereupon, counsel approached the bench and conferred with the Court, in a low tone of voice, as follows:)

The Court: One of the Deputy Marshals has just reported to the Court that the witness Ott's mother, who is waiting under subpoena, is anxious to be excused because she has children to take care of at home, and I don't
368 think she can be used today anyway, because she wouldn't be used until after the Government rests.

Mr. Offutt: That is right, Your Honor.

The Court: I think I will excuse her until tomorrow morning.

Mr. Offutt: Do you know where she is?

The Court: Where?

Mr. Offutt: She is in Erie, Pennsylvania.

The Court: If I excuse her, I will excuse her for the day. I will not excuse her to go back to Erie, Pennsylvania.

Mr. Offutt: That is why I wanted to take her deposition.

The Court: You didn't object to taking her deposition?

Mr. McLaughlin: As I say, he was going to use her as a witness, and brought her down here and I would like to hear her from the stand.

Mr. Offutt: He has talked to her before I did.

Mr. McLaughlin: I have never talked to the witness; I never said a word to the woman.

The Court: What do you want her for?

Mr. Offutt: He said he never talked to her.

Mr. McLaughlin: I never.

The Court: What do you propose to use her for?

Mr. Offutt: I issued a subpoena for Mrs. Hodges to produce the letters, the correspondence, between her daughter and herself, telegrams and letters, and before I could
369 get over and talk to her the daughter—

The Court: Just a moment. I am not going to require the production—I am not going to require any mother to produce all the letters that a child of her's has written her.

Mr. Offutt: I specifically set forth the letters of May 2nd, May 7th, May 5th and January 18th.

The Court: And what do you claim is the nature of those letters?

Mr. Offutt: I have been advised that she wrote and informed her mother in such a manner about this act on the 18th, and the other in May, that it would absolutely clear the doctor of any connection with the abortion.

The Court: Then all you need is those letters. You don't need the mother.

Mr. Offutt: That's right, but I want to have the mother identify the writing and her signature, and she also had telephone conversations even during the time this trial has been going on.

The Court: Well, I cannot excuse the witness.

Mr. McLaughlin: I understand she has no means of livelihood while she is here. I heard that from someone, I think the Deputy—didn't you say that?

Mr. Offutt: Your Honor, he is speaking so that he is facing the jury. We could have avoided this if he would let me take her deposition.

370 The Court: Why didn't you go up to Erie and take her deposition?

Mr. Offutt: You quashed that notice, Your Honor. I had it set here and you quashed it.

The Court: I didn't quash it.

Mr. Offutt: That was the motion Your Honor overruled.

The Court: You made no motion for leave to take the deposition of this witness in Erie, Pennsylvania.

Mr. Offutt: Oh, yes, it is in the written record. It is a written notice.

The Court: See if there is any.

Mr. Offutt: A notice.

The Court: Yes, I quashed the notice.

Mr. McLaughlin: Let him call her out of turn. I have no objection.

The Court: Of course you made that motion, and I only ruled on motions on the morning of the trial; it was too late then to go to Erie, Pennsylvania.

Mr. McLaughlin: It was made for the purpose of delay.

Mr. Offutt: I later asked if we could do it over a weekend.

Mr. McLaughlin: Why doesn't he call her out of turn?

The Court: Of course, you brought the witness here—

Mr. Offutt (Interposing): That was before I got her here.

The Court: You made that motion on the morning
371 the trial commenced, and of course I denied it.

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378 Q. You testified here that Dr. Peckham quoted you a price of \$350, is that right?

The Court: Now, we have been over that and you may not ask that again. There is too much time wasted
379 by repetition here.

Mr. McLaughlin: That's what I say.

Mr. Offutt: I can't examine this witness with all this interruption, I just can't do it—the Court and Mr. McLaughlin.

The Court: I shall not permit you to keep re-examining her over and over again about the same thing.

Mr. Offutt: I am trying to lay the foundation for it, Your Honor.

The Court: I have given you full leeway to cross-examine her at length, and you have been cross-examining her since a quarter of twelve yesterday, and I will not permit you to repeat.

• • • • •
383 The Court: Mr. Offutt, I told you the kind of questions you have a right to ask concerning this statement, and I will confine you to that.

Mr. McLaughlin: I don't get the significance, Your Honor. Surely he is not trying to impeach her by a statement she didn't make, to show she made different statements before.

Mr. Offutt: I can show something about it, if you will let me do it.

Mr. McLaughlin: Go right ahead.

Mr. Offutt: I object to him making statements; Your Honor, after he sits down.

The Court: Let there be no colloquy between counsel, I said.

I think you have no right to complain because you probably have been guilty of more breaches of my rule than Mr. McLaughlin.

Mr. Offutt: I have never made a statement to him personally—I object to that, Your Honor.

The Court: Proceed, and please maintain your proper decorum. Proceed.

Mr. Offutt: Now that the witness has seen it, may I ask that question?

384 The Court: Yes—well, you don't have to repeat the question.

Do you remember what the question was?

The Witness: What was it?

The Court: Whether you made that statement to the police, or not.

The Witness: I made that statement, yes.

Mr. Offutt: No, not whether she made the statement, but whether she made what I just read.

The Witness: Whatever you read from that statement I made, yes; I signed that; that is my statement; anything in it, I said.

The Court: Don't talk in that belligerent tone to the witness.

Mr. Offutt: I didn't mean it that way, Your Honor, I assure you.

The Court: I am sure you didn't, but still, let it not be done.

Mr. Offutt: We get a little excited here, Your Honor.

By Mr. Offutt:

Q. Didn't you say this—Your Honor, I think it is only fair to the witness that I read one sentence above there because it continues the thought.

The Court: You may do so.

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387 The Court: Well, it is immaterial whether she phoned from a telephone booth or from her room.

Mr. Offutt: I don't know, they might have a record
388 of that phone call charged up to her account.

The Court: What is that?

Mr. Offutt: If she made it from the room they might have a record of that phone call charged up to her account.

The Court: Then the way to find out is for you to subpoena the records of the hotel.

Mr. Offutt: I know, I have tried to get them; I haven't seen them yet. I have asked for them.

The Court: I think you can ask her her recollection now.

Mr. Offutt: I want to see the records.

The Court: You have a right to see the records. Have you served the hotel?

Mr. Offutt: I have served them and they say they are right here in the District Attorney's hands.

Mr. McLaughlin: I have them right here.

Mr. Offutt: How can I see them if he won't give them to me?

The Court: Don't get excited.

Mr. Offutt: It's enough to get excited.

The Court: You must maintain your usual calm and courteous tone.

Mr. Offutt: I mean to be courteous at all times, Your Honor.

The Court: No, you haven't, you may not be conscious of it.

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392 Mr. Offutt: May I make one request? I have an appointment at the doctor at 4 o'clock, and I would like to go.

393 The Court: We won't recess now.

Mr. Offutt: I have a conditon wrong with me that I have to have diagnosed.

Mr. McLaughlin: I object to this sympathy angle of his.

The Court: This court is more important than the doctor.

Mr. Offutt: I am talking about myself.

The Court: The doctor can wait five or ten minutes.

Mr. Offutt: I am not talking about myself, I am talking about the doctor.

The Court: You can get to the doctor's office in 15 minutes.

Mr. Offutt: No, he is up on Biltmore Street.

Mr. McLaughlin: I object to this sympathy angle, Your Honor.

The Court: Call your next witness.

Mr. McLaughlin: Call the man from the Harrington Hotel.

Mr. Offutt: May I see those records before he goes on the stand? Those are the records I have subpoenaed.

The Court: You may not make any statement.

Mr. McLaughlin: As soon as I examine him I will be glad to show them to you.

Thereupon—

Carl L. Sullivan

was called as a witness by the United States, and being first duly sworn, was examined and testified as follows:

394 Direct Examination

By Mr. McLaughlin:

398 Mr. McLaughlin: That is all.

Mr. Offutt: Your Honor overruled my objection?

The Court: Now, you may see those documents, Mr. Offutt.

Mr. Offutt: Your Honor has already admitted them in evidence, I take it.

The Court: Well, if you have any objection—

Mr. Offutt (Interposing): I objected a long time ago.

The Court: What is that?

Mr. Offutt: I objected before they were admitted.

The Court: I overruled the objection. They are records kept in due course of business.

Mr. Offutt: I didn't hear you.

The Court: Do you have any cross-examination of this witness?

Mr. Offutt: Your Honor, may I not get a chance to look at these? I have been trying to look at them.

The Court: You may do so.

Mr. Offutt: I am sorry, Your Honor—maybe I am—

The Court: The Court expects counsel to be a little more courteous.

Mr. Offutt: I'm sorry.

The Court: I was about to suggest, if you have no cross-examination we will recess so that you can go to your doctor.

Mr. Offutt: Your Honor, I would like to go to my doctor but I would like to have a chance to look at this record and cross-examine the witness.

401 Mr. Offutt: May we approach the bench while the jury is looking at the exhibits?

The Court: Yes, you may approach the bench.

(Thereupon, counsel approached the bench and conferred with the Court, in a low tone of voice, as follows:)

402 Mr. Offutt: Your Honor please, maybe Your Honor didn't mean it, but I object strenuously to Your Honor's characterization of my conduct, and I am telling you I am sick; I had to go to the nurse, and I can hardly see you right now, and I have had a lot of trouble, and I resent it. I don't mean to be discourteous and if there is any question I want to have that tested right now. I am not discourteous, but I am sick, but I wanted to go to the bath and you wouldn't let me go.

Mr. McLaughlin: He has never denied you.

Mr. Offutt: I object to your letter Mr. McLaughlin repeatedly interrupt me.

Mr. McLaughlin: His Honor has never denied him the right to go to the bathroom.

The Court: That's silly.

Mr. Offutt: I have called Dr. Gannon and he is a busy doctor, and I am entitled to get some consideration. It is diverticulitis and it's a serious thing.

First you fined me; you wouldn't let me tell you anything.

I didn't want to stand up in front of this jury and tell them I had been up all night, going to the toilet.

Mr. McLaughlin: I think the Court is entitled to a telephone call.

Mr. Offutt: It was done—he keeps interrupting, Your Honor.

The Court: Just a moment. I have suggested to
403 - you that your tone on several occasions has been
somewhat belligerent, and I did say that you prob-
ably didn't intend it such, but certainly the Court cannot
permit that. The Court, in order to maintain its own dig-
nity and self-respect, has to insist on proper decorum.

406 Wednesday, June 4, 1952

408 · Mr. Offutt: * * *

Your Honor, in connection with that witness I would like to recall the witness Ott because of certain information which has come to my attention, and for other matters that I overlooked in the hurry of my cross-examination. Your Honor promised me that I could recall her if I had overlooked something.

The Court: No.

409 Mr. Offutt: I will find it in the record.

The Court: I want you to be accurate, Mr. Offutt.

Mr. Offutt: I will find it in the record.

The Court: I said you might call her, as I thought you would complete her cross-examination before you had an opportunity to read the statement given by her to the police. And I did say that if you read the statement afterward I would let you recall her for the purpose of confronting her with that statement, but you finished cross-examining her as to that statement. I will not let you recall her, unless you tell me what you want to recall her for, and unless it is in the interest of justice.

What do you want to recall her for? You must realize you had her under cross-examination all day yesterday and for a very large part of the day before.

Mr. Offutt: A large part of the day before—Your Honor kept repeatedly saying I had her under cross-examination from a quarter of twelve, for twenty-four hours. I didn't have her under cross-examination over twenty-four hours.

The Court: Mr. Offutt, you must—

Mr. Offutt (Interposing): I understood that.

The Court (Continuing): —you must stop your inaccuracies; I might have to call it by a more serious name.

I didn't say you had her under cross-examination for twenty-four hours. What I did say was that this
410 cross-examination—

Mr. Offutt (Interposing): Your Honor, you are talking loud enough for the jury to hear it.

The Court (Continuing): —that this cross-examination started twenty-four hours ago, which is entirely different.

Mr. Offutt: I remember the twenty-four hours. I remember now that you did say that.

The Court: But if you are going to quote me, I want you to quote me accurately.

Mr. Offutt: I do say that you did say that. In fact I didn't feel well yesterday, and I told Your Honor that I didn't, and I have a doctor's orders to have these X-rays—

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413 The Court: What is your request?

Mr. Offutt: I ask Your Honor to tell the jury at this time, so that they will not get some idea that I did something wrong, that if that conversation was made with the consent of either one of the parties who were having the conversation, and if it was listened in to by someone with the consent of either of those parties who was making the telephone conversation, there was nothing improper about it; it was not in violation of the Federal Communications Act.

And further, as to the statements you made in the presence of the jury that I was stupid, or I couldn't be that stupid, I say that reflects on me, and I ask Your Honor to say something to me, in the presence of the jury, to correct that. Your Honor accused me of being—

The Court: I am going to let the record stand. I am going to instruct the jury, however, when I come to charge the jury at the close of the trial, that they will consider nothing except the question as to whether the defendant did or did not commit the crimes with which he is charged.

Mr. Offutt: The trouble is now that since they are made with the actions you did at the time, leaning forward and with great emphasis on that—

The Court: I have made my ruling.

Mr. Offutt (Continuing): I didn't notice it yesterday, but it was called to my attention later, and I thought I
414 had heard it right, but I wanted to be sure—I move for a mistrial on account of that.

The Court: There is one other thing that bothers me in this case, and that is this situation of the mother of Mrs. Ott, who has been subpoenaed here from Erie, Pennsylvania, and who stated to the Marshal that she has six children at home and apparently she is in financial difficulties by reason of being compelled to remain here. Is she being paid her per diem? She is entitled to it.

Mr. Offutt: May I call Your Honor's attention to something? I have talked to the Marshal and he talked to the mother. He said she did not speak to the Marshal. She went upstairs to Mr. McLaughlin when the daughter took her there, and the daughter spoke to the Marshal, and I asked her today and he said the witness on the stand told her this.

The Court: I will remind counsel that witnesses are entitled to per diem, and I am not going to require the witnesses to remain in attendance unless they receive their per diem. That might relieve any financial difficulties she might have.

Mr. Offutt: Has she said there were any financial difficulties?

The Court: Yes, so I understood from the Marshal.

Mr. Offutt: The Marshal did not talk to the mother. He is right here and I just finished talking to him.

415 The Court: Proceed with the trial.

Mr. Offutt: I have been blocked and prevented from using the mother; I tried to call her right away—

Mr. McLaughlin: Call her out of turn, it's all right with me.

Mr. Offutt: I would like to call her out of turn, with the understanding it will not affect my defense and I am not waiving any rights.

The Court: So that she may return home?

Mr. Offutt: Yes.

The Court: Very well. You may call her out of turn.

Mr. Offutt: Before we conclude I would like to ask Your Honor about this situation. This lady, when I issued a subpoena, came to Washington and I tried to get in touch with her.

The Court: I don't want to know anything about that.

Mr. Offutt: I am calling this witness as an adverse witness.

The Court: Oh, you are not.

Mr. Offutt: Can I tell Your Honor why? If necessary I will go under oath.

The Court: No. I determine whether a witness is an adverse witness after the witness takes the witness stand and by the attitude the witness displays on examination by counsel. I will not determine in advance of a witness
416 whether he is adverse or not. Now, you may call her at this time, out of turn, if you wish to call her at all.

You may go back to counsel table, gentlemen.

Mr. Offutt: I understand it is not to affect the defendant's right in any way for any motion.

The Court: That is right. It will not affect your right to make a motion for acquittal at the close of the Government's case.

Mr. Offutt: Yes, Your Honor.

The Court: Very well.

(Thereupon, counsel resumed their places at the trial table and the following proceedings were had in open court:)

The Court: It is understood that Mrs. Ott's mother may be called by the defense, out of turn, in order that she may be released.

You may call her now.

Mr. Offutt: Thank you for that courtesy, Your Honor.

Will you call Mrs. Ethel Hodges?

If the Court please, I object to Mrs. Ott being in the witness room (sic) talking to a newspaper reporter; she is sitting in the front row talking right now.

Mr. McLaughlin: I object to that.

The Court: She has a perfect right to talk to anyone she pleases.

417 Mr. Offutt: In the courtroom?

The Court: She has a perfect right to talk to anyone she pleases so long as she doesn't disturb the proceedings, or make any noise.

You have no right to make that kind of statement.

Mr. McLaughlin: No; it is unfair. It is just to attract attention, that's all.

Mr. Offutt: I object to counsel's statement, Your Honor, addressed to someone else other than the Court. Government counsel has repeatedly done that, and I object to it.

The Court: Anyone in the courtroom has a right to talk to anyone else in the courtroom, so long as it is done quietly; that is perfectly proper.

Thereupon—

Ethel Hodges

was called as a witness by the defendant, and being first duly sworn, was examined and testified as follows:

Direct Examination:

Mr. Offutt: Your Honor, I wonder if I might have the witness Ott excluded while this lady is being examined.

The Court: No.

Mr. Offutt: I understood I was going to examine her concerning certain records.

The Court: No. We only exclude any witness before the witness has testified.

By Mr. Offutt:

Q. Your name is Mrs. Charles Hodges? A. Yes, sir.

Q. Mrs. Hodges, will you keep your voice up, please? A. Yes, sir.

Q. Just sit back and relax.

The Court: What is your full name?

The Witness: Mrs. Charles Hodges.

The Court: No; what is your name?

The Witness: Ethel Hodges.

By Mr. Offutt:

Q. Mrs. Hodges, your first name is spelled E-t-h-e-r? A. Or "e-l", either way.

Q. And your husband's name is Charles Hodges? A. Right.

Q. And I believe you live at 119 East 2nd Street, Erie, Pennsylvania? A. I do.

Q. Mrs. Hodges, does your daughter, Mrs. Mary Lee Ott, live at that address? A. When she is in Erie. She hasn't been in Erie for years, to live.

Q. How long has she been away from Erie?

Mr. McLaughlin: I object to this as immaterial.

419. The Court: I don't think that is material. Objection sustained.

Mr. Offutt: Of course the difficulty, Your Honor—

Mr. McLaughlin: I object to that.

The Court: No, no. Proceed to the next question.

By Mr. Offutt:

Q. Did you receive a subpoena served on you, in Erie, Pennsylvania, to come here and testify?

The Court: I exclude that; it is immaterial. She is here and you may examine her.

Mr. Offutt: If Your Honor please, if I am going to have interruptions like this, I don't want to examine the witness at all. I want to examine this witness and I want to have free opportunity to present what I have.

The Court: Now, you are getting insolent.

Mr. Offutt: I don't mean it insolently.

The Court: You will have to conduct your examination within the framework of the rules of evidence as the Court construes them. Now, proceed.

Mr. Offutt: Well, I will have to wait until I present my case.

The Court: You may proceed now.

Mr. Offutt: Are you ordering me to proceed? I would rather wait now until my case is over.

The Court: I direct you to proceed.

420 Mr. Offutt: May I object to being ordered to proceed at this time?

By Mr. Offutt:

Q. When did you first come to Washington in connection with this case, Mrs. Hodges? A. Sunday.

Q. When did you first talk with me about this case—anything at all?

The Court: I am going to exclude—

Mr. Offutt (Interposing): I will withdraw the question.

The Court (Continuing): —anything as to any conversation between you.

Mr. Offutt: I am not asking for the question. I have withdrawn the question, when did she first talk to me.

The Court: I think it is immaterial, Mr. Offutt. You examine the witness concerning any matters relevant to this case.

Mr. Offutt: Well, I want to, Your Honor.

By Mr. Offutt:

Q. When you came to Washington, where did you go, what address?

Mr. McLaughlin: That is immaterial, Your Honor.

The Witness: Mr. daughter's address.

By Mr. Offutt:

421 Q. What address was that? A. It is Q Street, 3001, I guess, Q Street.

Q. Are you staying there now? A. No.

Q. Did you ever stay there since you have been in Washington?

Mr. McLaughlin: I object to this.

Mr. Offutt: Your Honor—

The Court: Objection sustained.

By Mr. Offutt:

Q. When you arrived in Washington and went to 3009 Q Street, Northwest, what time did you get there and what did you do?

Mr. McLaughlin: It is immaterial.

The Witness: Sunday.

The Court: Well, I don't know; that may be preliminary.

The Witness: Sunday around 11, I suppose. I just didn't notice the time, but it was Sunday around 11 o'clock, I believe.

By Mr. Offutt:

Q. Was your daughter there at that time? A. No, not just when I arrived.

Q. Who did you see when you went there? A. The lady that runs the rooming house where she lives; the landlady. I suppose you would call her

Q. Did you have a conversation with that lady—don't say what it was.

Mr. McLaughlin: I object to this. That is immaterial.

422 The Court: Objection overruled. Just answer yes or no.

By Mr. Offutt:

Q. Did you have a conversation with her? Just answer yes or no, the Court said. A. Yes.

Q. Before having a conversation with that lady, had you ever been told by anybody in connection with my office anything about the facts of this case?

Mr. McLaughlin: I object to that.

The Court: Objection sustained.

Mr. Offutt: If Your Honor please, I object to Your Honor raising your hand and leaning forward and looking at the District Attorney before he makes an objection.

The Court: Mr. Offutt, will counsel please come to the bench?

(Thereupon, counsel approached the bench and conferred with the Court, in a low tone of voice, as follows:)

The Court: Mr. Offutt, if you continue your insolent remarks, I am warning you now, at the end of this trial I will commit you to jail for contempt of court.

Mr. Offutt: Didn't Your Honor do that?

The Court: You have no right to address questions to the Court.

Out of kindness to you I am warning you that if you persist in your unethical and discourteous conduct I
423 shall send you to jail at the end of this trial. I shall not fine you, I shall send you to jail.

Mr. Offutt: I don't mean it as a discourtesy. Judge Stephens said we should put these things in the record as they happen, and I saw Your Honor did it yesterday, you screamed so and you jumped forward and I thought you had said something.

The Court: Go back to counsel table; I have given you my warning.

Mr. Offutt: I won't make any statement about that.

(Thereupon, counsel resumed their places at the trial table and the following proceedings were had in open court:)

The Court: You may proceed.

Mr. Offutt: I was waiting for counsel.

The Court: No, there is no reason for that. You may proceed.

By Mr. Offutt:

Q. Now, Mrs. Ott (sic) did there come a time when your daughter did come to 3009 Q Street, after you had arrived on Sunday? A. You said Mrs. Ott; I am Mrs. Hodges.

Mr. Offutt: Oh, I beg your pardon, Mrs. Ott (sic)—I am sorry.

The Witness: Yes, she came in.

424 By Mr. Offutt:

Q. About how long was it after you were there? A. Fifteen or twenty minutes, I suppose.

Q. And after she arrived did you have a conversation with your daughter? A. Yes.

Q. Had you received a letter from me in connection with your trip here? A. Nothing other than the subpoena.

Mr. McLaughlin: I object to this.

The Court: Stop a moment, please. Objection sustained.

By Mr. Offutt:

Q. Did you receive your compensation in advance payment to get here?

Mr. McLaughlin: I object to this, Your Honor.

The Court: Objection sustained. That is irrelevant.

Mr. Offutt: I thought Your Honor asked that question at the bench, Your Honor—I am sorry.

By Mr. Offutt:

Q. As a result of that conversation—oh, before your daughter arrived, can you tell us whether or not, as a result of that conversation with the landlady, Mrs. Steerman, a telephone call had been made at your instance to me to come over?

Mr. McLaughlin: I object to that, Your Honor, as immaterial.

425 The Court: Objection overruled. You may answer.

The Witness: That you were called? Am I supposed to answer you were called?

Mr. Offutt: If that is true, yes.

The Court: You are supposed to answer questions.

The Witness: Yes.

By Mr. Offutt:

Q. Before your daughter arrived and you had the conversation with her, were you waiting for me to come over?

A. I was just waiting. I didn't know what to do. I wanted to see my daughter. I wanted to know where I should stay and eat, and I wanted my daughter.

Q. My question was, before your daughter got there, and after this telephone call had been made, were you waiting for me to come over? A. Yes.

The Court: She answered the question. She said she was waiting for her daughter.

Mr. Offutt: No, she said "yes" to the last question.

The Court: Very well; proceed.

By Mr. Offutt:

Q. When you were waiting for me to come over was that when your daughter came? A. Yes.

426 Q. And after your daughter arrived and you had talked with her, in this conversation you had did you exhibit to her the letter from me and a subpoena which you had received? A. Yes.

Q After that conversation and showing her this letter and the subpoena, what did you and your daughter do?

Mr. McLaughlin: I object to that.

Mr. Offutt: I will withdraw it.

By Mr. Offutt:

Q. Did you continue to wait there for me or did you leave the house?

Mr. McLaughlin: I object to that.

The Court: I am going to overrule the objection. This may be preliminary to something that is admissible.

Mr. Offutt: It is. The Judge says you may answer that question.

The Witness: Yes, we left to eat.

By Mr. Offutt:

Q. Did you ever come back to that house, yourself, after that time? A. No.

Q. Have you got that subpoena with you now that was served on you? A. In my purse.

Q. You have it? May I see it?

(The witness hands document to counsel for defense.)

427 By Mr. Offutt:

Q. Have you the letter? A. The letter, it is misplaced somewhere; it was in my purse when I started, but I don't know whether I dropped it in the hotel room, but it isn't in there.

Q. And was the letter in an envelope?

The Court: I think that is irrelevant. If you want to elicit something relevant from this witness you must proceed to do so now.

Mr. Offutt: I will connect that up with—

The Court: No; you must come right to the point that you want to bring out with this witness.

Mr. Offutt: All right.

By Mr. Offutt:

Q. When was the first time that you saw me or talked to me after you came to Washington?

Mr. McLaughlin: I object to that, Your Honor, as immaterial.

The Court: I am going to exclude that as being irrelevant. You have already asked that question and I have already excluded it. Any conversation between the witness and you is not admissible.

Mr Offutt: I am not asking that. I want to show when she first talked to me or saw me.

The Court: Well, it is immaterial because that
428 would not be admissible.

By Mr. Offutt:

Q. Will you state whether or not, as a result of that conversation with you daughter, and subsequent conversations, you did not talk with me about this case?

Mr. McLaughlin: That is immaterial; I object to that, Your Honor.

The Court: Objection sustained.

All this might be proper if she was a government witness and you were cross-examining her, but this isn't admissible on direct examination. If she were a government witness and you were cross-examining her, this might be admissible, but this is not admissible in connection with your own witness.

You may proceed.

By Mr. Offutt:

Q. Do you know a Lieutenant Ernst of the Sex Squad?

A. I met him.

Q. When did you meet him?

Mr. McLaughlin: I object to this, Your Honor, as immaterial.

The Court: This may be preliminary. I will allow it.

By Mr. Offutt:

Q. When did you meet him? A. Sunday.

429 Q. Where? A. Station.

Q. Where? A. At the station.

Q. Union Station? A. No, at the police station, I suppose it is; I don't know anything about that.

Q. You mean across the street here at police headquarters, is that what you mean? A. Yes.

Q. Is he in the courtroom anywhere?

Mr. McLaughlin: I object to this as immaterial.

The Witness: I don't think I would know him if I saw him.

By Mr. Offutt:

Q. Have you seen him since you have been in court here?
A. I have not.

The Court: I am excluding that as immaterial.

By Mr. Offutt:

Q. How did you come to go over to the police headquarters to see Lieutenant Ernst, on Sunday?

Mr. McLaughlin: I object to that, Your Honor.

The Court: I am going to exclude that as irrelevant. She is your witness. If you want to prove anything by her, this is your opportunity. You may proceed.

Mr. Offutt: I am laying the foundation for it, Your Honor.

430 The Court: No, no; that is irrelevant.

By Mr. Offutt:

Q. And were you present when any telephone call was made to me on Sunday, by your daughter?

Mr. McLaughlin: I object to this, Your Honor.

The Court: Objection sustained.

Mr. Offutt: Her daughter, if Your Honor please, it is in connection with her daughter's testimony, about that incident.

The Court: You cross-examined the daughter at length concerning the conversation.

Mr. Offutt: That's right, and I want to contradict her daughter by this witness, contrary to what her daughter says. That is the reason I am calling her in my case.

The Court: Very well; you may do so.

By Mr. Offutt:

Q. Were you present when any telephone call was made by your daughter to me, at my home? A. I didn't know that she made any special call to any special person. She might have used the phone in the place where I was, but I don't know of any special call to any special person that she made.

Q. Were you with her at all times when she was over at Lieutenant Ernst's office, in police headquarters? A. 431 Well, I was around; it is quite a big building. I was in the building at the same time, not particularly with her all the time.

Q. Did you overhear any conversation while she was talking to Mr. Offutt and call her attention to that?

Mr. McLaughlin: I object to that. She said she didn't hear any conversation called to any particular person.

The Court: All right; I will let him probe the witness.

By Mr. Offutt:

Q. In this room you were in, can you give us some idea of the number of phones in that room?

Mr. McLaughlin: I object to that.

The Court: I am going to exclude that. She has said she didn't hear the conversation.

Now, I will let you cross-examine or rather examine this witness concerning the contents of the conversation, if she remembers them, but she says she doesn't remember them.

By Mr. Offutt:

Q. Did you tell your daughter you heard any of the conversation she was having on the telephone?

Mr. McLaughlin: I object to this, Your Honor.

The Court: Objection overruled.

Mr. Offutt: If Your Honor please, I object to this witness Ott—I call Your Honor's attention, she was nodding her head forward. Your Honor, that is the very reason I object to Mrs. Ott being in the front row, looking at
432 the witness.

Mr. McLaughlin: This is trying to be sensational, Your Honor.

Mr. Offutt: It is not sensational.

The Court: This is a public courtroom.

Mr. Offutt: Now she is shaking her head the other way.

The Court: You must not cause any commotion, Mr. Offutt; you must behave yourself.

Mr. Offutt: I ask Your Honor to instruct the witness, Mrs. Ott, not to make any indication of any kind, nod her head up and down, or shaking it in the negative. I object to this witness. It is to contradict Mrs. Ott.

Mr. McLaughlin: I want to go on record that the defendant is trying to be sensational.

Mr. Offutt: I am not trying to be sensational. I ask Your Honor to call upon the witness and keep the witness from nodding.

The Court: You are guilty of a serious breach of decorum. Please bear in mind the admonition I made at the bench.

Proceed.

Mr. Offutt: May I have the question read and the answer, please, Your Honor?

The Court: No. You ask the question again. You interrupted yourself, you know, by this commotion.

Mr. Offutt: Your Honor, I object to that statement by the Court. I thought I was bringing something to the Court's attention.
433

The Court: Yes, but you did it in an excitable manner and—

Mr. Offutt (Interposing): It's enough to get excited.

The Court (Continuing): —and in a boisterous manner.

Mr. Offutt: I didn't mean to be boisterous.

The Court: I assume that you didn't mean that, but that is no excuse for a breach of decorum. Proceed.

By Mr. Offutt:

Q. Mrs. Hodges, did you have the letter with you at that time, containing the subpoena—the envelope containing the subpoena and the letter from me when you were over in the Sex Squad room?

Mr. McLaughlin: I object to that, Your Honor.

The Court: I shall exclude that as irrelevant.

By Mr. Offutt:

Q. How did you come to go over there with your daughter? A. Well, she thought it was a good idea to find a good hotel for me, to know what was a hotel that would be decent to put up in, what kind of place—

The Court: You have answered the question; you may stop.

By Mr. Offutt:

Q. Is that the reason you went over there? A. That is the reason.

434 The Court: I think it is immaterial where she went or why she went there.

Mr. Offutt: It is contradictory to the daughter's reason that she gave.

The Court: You may not contradict the witness on a collateral matter.

Mr. Offutt: I objected to it at the time because it was immaterial and Your Honor let it in.

The Court: I say it is immaterial, and I shall exclude it.

Mr. Offutt: I move that the testimony about that be stricken out.

The Court: You may proceed with the next question.

By Mr. Offutt:

Q. Was any discussion had, in your presence, about making a telephone call to me, by your daughter, from the Sex Squad room? A. No.

Q. Did your daughter give you any reason and did she state to you that she was going to call me from the Sex Squad room? A. No.

Q. Did your daughter ever tell you that she was going to call me to see why I had subpoenaed you down to Washington?

Mr. McLaughlin: I object to that.

The Court: I am going to exclude that because
435 that is entirely immaterial to any issue in this case.

Mr. Offutt: That is what the daughter gave as the reason for calling me, Your Honor.

The Court: Yes, but you may not contradict the witness' answer on cross-examination in respect to a collateral matter. This is a collateral matter. I am going to exclude this.

I am not going to let this trial go off on a tangent, because there is only one issue in this case, and that is whether the defendant is guilty or innocent, and I am not going to let any extraneous matters creep into this.

Mr. Offutt: I submit he has opened the door when he put it in himself.

The Court: I have made my ruling.

Mr. Offutt: May I object to that?

The Court: Yes, yes, and the objection is noted in the record.

By Mr. Offutt:

Q. This subpoena directed you to bring with you any and all letters and telegrams which you have received from your daughter, Mary Lee Ott, since February 6, 1951, particularly correspondence before and after May 2nd and correspondence before and after January 18th. And in that letter of explanation which came with it—

Mr. McLaughlin: I object to him testifying.

The Court: Don't read the letter. You may ask
436 any question.

Mr. Offutt: That is the reason I want to get the letter, because that was in it.

The Court: Ask the question you want to.

By Mr. Offutt:

Q. Did you bring any of those letters with you? Just answer yes or no. A. I had none to bring.

Q. Did you talk with your daughter by telephone before you came to Washington, from Erie, Pennsylvania? A. I did not.

Q. You did correspond with your daughter, did you not? A. I heard from my daughter regularly; every two weeks she kept in touch with me.

Q. By letter. And you would write to her, too, would you not? A. Yes.

Q. When you wrote to her, you wrote to a post office box, did you not—not to her address?

Mr. McLaughlin: I object to this.

The Court: Objection sustained. That is immaterial.

By Mr. Offutt:

Q. You didn't even know where she lived until after—

Mr. McLaughlin: I object to this.

The Court: Objection sustained. She is your witness.

437 Mr. Offutt: I know it.

By Mr. Offutt:

Q. Did you know where she lived? A. I did; I had her address. That is how I found her when I got here.

Q. When did you first get her address at 3009 Q Street? A. I have had it every since she moved here.

Mr. McLaughlin: I object to this.

The Court: Wait a minute, Mrs. Hodges. Don't answer any question until I have ruled on an objection.

Objection sustained. Don't answer too fast. Wait until I rule on the objection.

By Mr. Offutt:

Q. Do you remember a telephone call which was made by your daughter Ava Yankowsky—you have a daughter by that name, do you not? A. Yes.

Q. And do you remember a telephone call which was made by her to Republic 1776, on your behalf?

Mr. McLaughlin: I object to this.

The Court: Objection sustained. This has nothing to do with this case because it relates to another person.

You may proceed.

438 By Mr. Offutt:

Q. Did you direct your daughter to make a call for you to Republic 1776 on Wednesday of last week?

Mr. McLaughlin: I object, Your Honor.

The Court: Objection sustained.

By Mr. Offutt:

Q. The letter which you received contained with the accompanying subpoena, and the envelope with them, did that have the telephone number of 1776 on it, and Dorsey K. Offutt on the letterhead?

Mr. McLaughlin: I object to that.

The Court: Objection sustained.

Mr. Offutt: May I withdraw this witness for a minute and get that letter that she had? I can get it in a few minutes.

The Court: Do you have the letter?

Mr. Offutt: No, it is in the Sex Squad room over there.

The Court: I don't think it is relevant. Any letter you wrote to this witness is not relevant.

Mr. Offutt: It accompanied this, and it will explain—

The Court: No, it is not relevant.

By Mr. Offutt:

Q. You left that letter and envelope in the Sex Squad room, did you not, on Sunday.

Mr. McLaughlin: I object to this as immaterial.

439 The Court: Objection sustained.

By Mr. Offutt:

Q. When you met Lieutenant Ernst in the Sex Squad room of police headquarters, on Sunday, did he not make a telephone call, after talking with your daughter?

Mr. McLaughlin: I object to this.

The Court: Objection sustained.

By Mr. Offutt:

Q. Can you tell us whether or not he made a statement in your presence, to your daughter, and in the presence of Lieutenant Fred Donohower that he had to get it cleared before a telephone call could be made?

Mr. McLaughlin: I object to this; this is his witness. He is making these speeches and then we rule on it and of course the damage is done, but this is his witness.

The Court: What she heard Lieutenant Ernst say is not competent, and I shall exclude it. Lieutenant Ernst has not been called as a witness.

Mr. Offutt: He will be.

The Court: I don't know.

Mr. Offutt: Well, I am just calling this one out of turn.

The Court: I understand.

Mr. Offutt: I want to let this lady go back to Erie.

440 The Court: But in any event the matter concerning which you are interrogating the witness would be irrelevant.

Mr. Offutt: Can I make a proffer of what I intend to prove by this witness?

The Court: Yes, you may do so. You may come to the bench.

Mr. Offutt: That would be fine. Thank you.

(Thereupon, counsel approached the bench and conferred with the Court, in a low tone of voice, as follows:)

Mr. Oflutt: If Your Honor please, I intend to prove by this witness that she was over at headquarters. That she had gone to some place to eat, and Lieutenant Donohower came and met them, and he and her daughter talked at some length about something in connection with this case, and then a Lieutenant Ernst, at the Sex Squad, went to this room in police headquarters where he was.

Her daughter had some conversation with Lieutenant Ernst, and with this officer, Lieutenant Donohower. And then a telephone call was made.

Her daughter told her about it, told her about what these circumstances were, why she went there, and said that the Lieutenant Ernst said he had to call somebody so that he could get it cleared so that she could make a telephone call to me.

Her daughter had told Lieutenant Ernst that she wanted to call me about something, and that is the reason
441 he made the telephone call. And he made a telephone call to someone, and the name was not given, and then she made the telephone call to me, in the Sex Squad room.

Of course the mother didn't hear it, but that is what the daughter told her.

Then the doctor—I never told this woman and she never told her daughter—I never told her anything about this case, and further that Mrs. Hodges did not know where her daughter lived. That when she came here she called her daughter at the house and her daughter—that is she got the address, she didn't know the address but only knew the post office box number, and that's where she always wrote.

I expect to show a telephone call was made to her house. Her mother came over—and had the daughter do the talking on the telephone while she was there. The daughter,

Ava Yankowsky, she didn't know—at the mother's insistence, the mother being in Erie and I being here—and they called me back at Republic 1776 and I talked to her and told the daughter who I was and what I was trying to find out, and she told me the mother had told her that she didn't know where the daughter was, that she worked some place in Virginia, in the Marine Corps Headquarters; that her husband's name was Wilbur, and that is the extent of what she knew about her daughter. They knew nothing about this case except the mother was running back and forth.

442 The other information I have is that she, in a letter, her daughter told her that she herself attempted to do something to herself because she was so upset, not being with her husband, they being separated, and that is what caused this abortion.

Further, if Your Honor please, I want to show by the mother that last evening her daughter told Lieutenant Donohower what she testified to on the stand, and they met some place on 22nd and P Streets, a block away from the Wesley Hall, which is a dining room at 21st and P Streets, and told him about the testimony that she gave yesterday. That is the one Your Honor put on telephone call, and she asked him to say that he knew nothing about these facts at all.

The Court: I am going to exclude all of the matters that you have proffered as irrelevant, with one exception, and that is I will let you ask this witness whether she received any letter from her daughter in which the daughter said that she committed the abortion on herself. I will let you ask that.

Mr. Offutt: Now, if Your Honor please, in connection with that, I wanted to bring out that when she went to her house—she has told me this herself—and I have two witnesses that she has told me this, the mother—that she told me she left the house because the daughter asked her to leave, and she went to some hotel and that she did

443 not go back because the daughter didn't want to talk to her, and told her not to, and in my presence yesterday, when I got this statement from her, the daughter asked her not to talk to me and the daughter told her not to show me any letters she might have, or telegrams, so with that of course I am blocked.

The Court: I am going to exclude all that. I told you what I will permit you to inquire into. Of all the matters you have stated, I will permit you to inquire into any statements made by the daughter to the witness that the daughter tried to commit an abortion on herself.

Mr. Offutt: I don't want to ask her unless she has the letters. She has not produced the letters.

The Court: I will let you inquire about the contents of the letter, and I certainly will not let you make a fishing excursion into all the correspondence between mother and daughter.

Mr. Offutt: There is no fishing excursion. That's the reason I want the letter.

The Court: What letter?

Mr. Offutt: The letter that was sent to her explains that. All I want is just the details relating to this particular matter, May 2nd.

The Court: I told you what you may inquire into. You may proceed, gentlemen.

Mr. McLaughlin: Don't you think he ought to
444 preface that statement, "Did she receive any letters from her daughter discussing this case?"

The Court: I don't like to say "discussing this case"—discussing the matter of her miscarriage, yes.

Mr. McLaughlin: Yes, but without coming right out and saying—

The Court: Yes. You may do that.

Mr. Offutt: May I say to the witness, "Mrs. Hodges, did you receive any letter from your daughter stating that she had?"—

The Court: Oh, yes; you may ask that.

Mr. Offutt (Continuing): —“attempted to bring about an abortion?”

Mr. McLaughlin: Oh, I object to that.

The Court: What?

Mr. McLaughlin: That she had attempted—I think he ought to preface it, whether or not it was about it.

The Court: It is admissible, but I think—

Mr. McLaughlin: I think it is leading, Your Honor. This is his witness on direct.

The Court: But that is the only way he can get at it. Otherwise I would have to let him examine every letter that she received from her daughter, which I shall not permit at the present time. I will allow you to do that.

Mr. Offutt: Thank you.

445 (Thereupon, counsel resumed their places at the trial table and the following proceedings were had in open court:)

Mr. Offutt: I wonder, so I can be sure of the question—to have the reporter read that question just as it was.

Mr. McLaughlin: What question?

Mr. Offutt: The question Your Honor—

The Court: No; you ask the question in your own way.

By Mr. Offutt:

Q. Mrs. Ott— A. Hodges.

Q. I am sorry—I beg pardon—state whether or not you received any letter from your daughter, Mrs. Mary Lee Ott, stating that she had attempted to bring about a miscarriage on herself? A. No.

Q. Have you talked with your daughter about this case—have you talked with your daughter about this case before you took the stand today? A. No.

Mr. McLaughlin: I object to this, Your Honor.

The Court: I am going to overrule the objection.

Mr. McLaughlin: This is his witness.

By Mr. Offutt:

Q. Will you state whether or not your daughter
446 has been staying with you at the Lee House since
you came here Sunday? A. No.

Q. Has she stayed at the Lee House with you any
night? A. No.

Mr. McLaughlin: I object to this.

The Court: Objection overruled.

By Mr. Offutt:

Q. Yesterday, when you talked to me—did you talk to
me yesterday here in this courtroom after court convened?
A. Yes.

Q. And in the presence of this lady right here—will you
stand up? (Miss Charlotte Maskey stood.) A. Yes.

Mr. McLaughlin: Will you identify that lady?

Mr. Offutt: Miss Maskey.

Mr. McLaughlin: I say, she is an associate of yours.

Mr. Offutt: She has been identified to the jury.

The Court: She is associated with your office.

Mr. Offutt: Yes, Your Honor.

The Court: Very well.

By Mr. Offutt:

Q. Did your daughter not say, while you were talking
to me, "Don't talk to Mr. Offutt or tell him anything about
the case?"

Mr. McLaughlin: I object to this, Your Honor.

447 The Court: Objection sustained.

By Mr. Offutt:

Q. Did your daughter and Lieutenant Donohower—I
will withdraw that, Your Honor—have you seen—state
whether or not you have seen your daughter each day,
after the trial, since you have been here.

Mr. McLaughlin: I object to this as immaterial.

The Court: Objection overruled.

The Witness: Yes.

By Mr. Offutt:

Q. Will you tell the Court and jury whether I ever told you anything about this case, myself, or discussed—

The Court: No; objection sustained. Any conversation between you, or what you told the witness, is immaterial.

By Mr. Offutt:

Q. Did your daughter ever tell you anything about any of the facts in this case?

Mr. McLaughlin: I object to this, Your Honor. It is certainly fishing.

The Court: No; I think that is admissible. Objection overruled.

The Witness: Yes.

By Mr. Offutt:

Q. Do you know George Christenson? A. No.

448 Mr. McLaughlin: I object to this.

By Mr. Offutt:

Q. Do you know Pharmacist's Mate William E. Jones?

Mr. McLaughlin: I object to this, Your Honor.

The Court: That may be preliminary. I will overrule the objection.

The Witness: No, I don't know him.

By Mr. Offutt:

Q. Did your daughter have any financial difficulties around January 18, 1952?

Mr. McLaughlin: I object to that, Your Honor.

The Court: Objection sustained.

Mr. Offutt: I think that is all. Thank you.

Mr. McLaughlin: I have nothing to ask now.

The Court: The witness is excused permanently.

Mr. Offutt: Thank you very much.

(Witness excused.)

The Court: The Government may proceed.

Mr. McLaughlin: Call the man from the Raleigh Hotel.

Thereupon—

Edward Hammer

was called as a witness by the United States, and being first duly sworn, was examined and testified as follows:

Mr. Offutt: Your Honor, this subpoena, may I have that marked for identification, the one I got from the witness?

449 The Court: Yes; you may have it marked for identification.

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Direct Examination

By Mr. McLaughlin:

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Q. You say you are employed at the Raleigh Hotel, in what capacity. A. Credit Manager.

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452 **Cross-Examination**

By Mr. Offutt:

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453 Q. And was there any damage in the room itself, that you can testify about from the records of your hotel, or from your personal knowledge?

Mr. McLaughlin: I object to that.

The Court: Objection sustained as not proper cross-examination. It is without the scope of the direct examination.

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454 Q. Was there any charge made for any bloody linen or anything like that?

Mr. McLaughlin: I object to this.

The Court: For what?

Mr. Offutt: Any bloody linen.

Mr. McLaughlin: I object to this.

The Court: That is not within the scope of the direct examination. Objection sustained.

455

Robert P. Guyer

was called as a witness by the United States, and being first duly sworn, was examined and testified as follows:

456 Direct Examination

Q. And where are you employed? A. C. & P. Telephone Company.

457 Q. At the request of a subpoena issued by me, have you produced certain records of the telephone company? A. I have, sir.

Q. Can you tell us, on May 3, 1951, in whose name telephone number Taylor 1742 was listed?

Mr. Offutt: I object. The records speak for themselves and they are the best evidence.

The Court: Objection sustained.

By Mr. McLaughlin:

Q. Have you produced those records? A. I have, sir.

Mr. McLaughlin: Your Honor, I would like to offer this at this time.

The Court: You may do so.

Mr. Offutt: May I see it?

Mr. McLaughlin: Surely (handing document to defense counsel).

The Court: Yes, of course.

Mr. Offutt: I have no objection.

459 Mr. McLaughlin: May I show it to the jury?

The Court: Yes, indeed.

Mr. Offutt: Just a moment. If we are going to show it to the jury I think we ought to read the other things. He hasn't read everything that is on there.

The Court: I admitted the exhibit in evidence and the exhibit may be shown to the jury.

.

By Mr. Offutt:

Q. The other names which are on the exhibit which the jury is looking at, Josephine Peckham, that was the name I referred to when you said that was discontinued as of June, 1950? A. June 1, 1950.

Q. And was there any other listing that had been discontinued prior to that time?

Mr. McLaughlin: I object to this. I only offer it for one particular date, May 3, 1951.

The Court: Objection sustained.

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461 Q. The phone had been listed since 1930, isn't that right? A. That is right, sir.

Q. And as of 1930 do you recall what the listing was then, sir?

Mr. McLaughlin: Now, I object to that, Your Honor.

The Court: I will sustain the objection.

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Mr. McLaughlin: I say the Government is only offering the exhibit for one purpose; that is for this particular date, May 1, 1951, as to whose name that telephone was listed in, because that is the only thing important as far as this particular exhibit is concerned.

462 Mr. Offutt: That's why I object to him showing the whole exhibit to the jury, since the witness had read it and now since they have seen it.

The Court: Mr. Offutt, the Court wishes to remind you that Mr. McLaughlin asked this witness in whose name that number was issued. You objected to the question and stated on the ground that the record speaks for itself. Therefore it was necessary for Government counsel to offer the exhibit in evidence. If you had not objected to the question, why of course probably the exhibit would not have gone into evidence. I don't think this is very important anyway.

Mr. Offutt: I don't think so.

Mr. McLaughlin: It is very important, Your Honor. It corresponds with this telephone number that was called from this hotel room.

The Court: No, I don't mean that; I mean the prior entries have no bearing.

Mr. McLaughlin: Oh, no.

Mr. Offutt: I object to Mr. McLaughlin arguing with Your Honor.

The Court: No wonder you are laughing, because I am surprised that you should make that objection.

Mr. Offutt: I want to keep things going, Your Honor.

If Your Honor please, I object to Lieutenant Ernst being in the courtroom; I intend to call him as a witness and I object to him being here.

463 The Court: Who is that?

Mr. Offutt: Lieutenant Ernst.

Mr. McLaughlin: If Your Honor please, I am going to object to this fellow being sensational here with these remarks.

The Court: You say you are going to call him?

Mr. Offutt: Yes indeed, I am going to call him.

The Court: Have you subpoenaed him?

Mr. Offutt: No, sir.

The Court: Then he is not under the jurisdiction of the Court.

Mr. Offutt: He is under the jurisdiction of the Court right now, in this courtroom. I ask Your Honor—

Mr. McLaughlin: I don't know why he is raising the question now; he has been here every day to my knowledge.

Mr. Offutt: I didn't see him.

Mr. McLaughlin: Well, I have.

The Court: Anyway, the rule excluding witnesses is not a mandatory rule; it is a matter within the discretion of the Court.

Is the Government going to call Lieutenant Ernst?

Mr. McLaughlin: No, Your Honor.

The Court: Then I shall not exclude him.

Mr. Offutt: I thought Your Honor issued the rule on witnesses.

The Court: But Lieutenant Ernst is not a witness.

464 Mr. Offutt: I say he is now.

The Court: It is too late now.

Mr. Offutt: I stated it earlier to you.

The Court: He has been here so far.

Mr. Offutt: No, he hasn't been here; I have looked around every day and I didn't see him.

Mr. McLaughlin: He has been here every day.

Mr. Offutt: I will issue a subpoena for him right now, if Your Honor will give me a moment I will do it.

The Court: No, I shall not let you use the process of this Court in this manner.

Mr. Offutt: I object to that statement by Your Honor.

The Court: You may proceed.

Mr. McLaughlin: May this witness be excused?

The Court: Have you any further cross-examination?

Mr. Offutt: I understood Your Honor said I couldn't ask anything further about the exhibit, so I have no further cross-examination.

The Court: Now, just a moment. You are misquoting the Court.

Mr. Offutt: That is my understanding. Didn't you say that?

The Court: Don't ask any questions of the Court, please.

Mr. Offutt: All right.

The Court: I ruled on certain matters. I ruled
465 on the questions you asked. I did not rule on any
questions that you might ask in the future. So don't
make a statement that because I am not permitting you to
inquire into a certain matter you don't want to cross-ex-
amine this witness. Have you any cross-examination?

Mr. Offutt: I would like to ask about the other notations
on the exhibit.

The Court: Ask any questions you wish and I shall rule
on them after they are asked. I don't rule in advance.

Mr. Offutt: Oh, all right; thank you, sir.

• • • • •
466 Q. According to this, the contract for the phone
was originally made, and so far as this contract,
still remains, was with Felix A. Peckham, was it not? A.
Felix A. Peckham is still our subscriber.

The Court: Mr. Offutt, I understood you were willing
to stipulate that this telephone number is this defendant's
telephone number.

Mr. Offutt: That is right.

The Court: Well, that is the only thing that is relevant
on that issue.

Mr. Offutt: But since they have seen it all, I just wanted
the jury to know what these other ~~marks~~ are they were
looking at so they won't get any wrong ideas.

Am I not allowed to continue?

Mr. McLaughlin: I don't know whether this fellow does
this purposely to aggravate people or not, but I object to
his conduct.

The Court: Mr. Offutt, that was not a proper statement
to make in open court.

Mr. Offutt: I don't understand, Your Honor?

The Court: Proceed.

Mr. Offutt: I have no further questions to ask.

The Court: The witness may be excused.

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468 Mr. Offutt: I want to serve a subpoena—I cannot use the processes of this Court—I thought we did it properly, I tried to find out who he was, since I know his name and he was around the court, and we can't serve a man in the courtroom, and he is in the courtroom now, and I submit I am entitled to have that man excluded from the court.

Mr. McLaughlin: As far as Ernst is concerned, Your Honor, this attorney has talked to Ernst on five or six different occasions. I saw him around the courts here for the last week.

The Court: I want to say another thing, while you gentlemen are at the bench. I think that subpoenaing this girl's mother, from Erie, Pennsylvania, was a misuse of the process of this Court.

Mr. Offutt: Judge Laws suggested that I do it, Your Honor; he said to use the process of the court.

The Court: He didn't know what you intended to prove by her.

Mr. Offutt: If I had gotten these letters I could have proved what I said.

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469

George A. Christenson, Jr.,

was called as a witness by the United States, and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. McLaughlin:

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485 Q. And-did something unusual happen to Miss Ott while you were in the room? A. Yes.

Q. What happened to her? A. Well, she gave birth to the foetus of a child.

• • • • •

Mr. Offutt: Just a minute. I move that his statement in reference to it as the foetus of a child be stricken out. He is not an expert.

The Court: That is a conclusion.

Mr. McLaughlin: I don't object to it, but I say it is perfectly proper; it is just like me calling that (indicating) a bottle. I have learned it as being a bottle by reading in the book, as he can say it was a foetus because of his reading and knowledge of it. It's just like that.

The Court: I think that is a medical matter. I think he can describe in detail as to what happened.

Mr. McLaughlin: I have no objection, but I thought of it—

Mr. Offutt: I object to Mr. McLaughlin talking and arguing with Your Honor after Your Honor has ruled.

The Court: Just a moment; I have ruled. You certainly should not object to my sustaining your objection.

486 Mr. Offutt: I am objecting to Mr. McLaughlin continuing talking.

The Court: I understand that, but I have ruled in your favor and I don't think you should proceed talking.

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500 **Dr. John Taylor Kilpatrick**

was called as a witness by the United States, and being first duly sworn, was examined and testified as follows:

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510 Cross-Examination

By Mr. Offutt:

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519 Q. What was the history the patient gave on admission? A. I did not see the patient on admission.

Q. What was the history? Do you have it there? A. Yes.

Q. What was it?

The Court: Just a moment.

Mr. McLaughlin: I don't think this is admissible.

The Court: This witness said he did not see the patient. You did not get the history yourself, did you?

The Witness: Not the one on admission.

By Mr. Offutt:

Q. Did you read the record of the patient's case, the history and various parts of the record, in connection with your service on this patient?

The Witness: Is that permissible, Your Honor?

The Court: You may answer yes or no.

The Witness: Will I read to you the record?

The Court: No, no. I understood the question to be whether you read the record.

The Witness: Oh, yes, I have read the record.

By Mr. Offutt:

Q. Sure, and of course in forming your opinion and in treating this patient you used the history and the entire record, didn't you? A. Yes.

Q. And in forming your opinion that you have just given us, you used the entire record, and your knowledge of her case, didn't you? A. Yes.

Q. Will you tell us what that opinion was that you used to base your opinion upon—I mean that history of January 18th, the date of admission? A. I don't understand the question.

Q. Will you tell us what the history was that the patient gave, that you read and used in basing your opinion?

Mr. McLaughlin: I think along with it is his observation and opinion.

Mr. Offutt: I can't take it all at one time; I am taking it piece by piece.

Mr. McLaughlin: Take it all together.

Mr. Offutt: First, we will take the history on admission.

The Witness: A 24-year-old white female who was admitted to the hospital 1-18-52; had recently been discharged

from that hospital where she had been treated by an operation for nephropexy.

By Mr. Offutt:

Q. What is a—is that spelled n-e-p-h-r-o-p-l-e-x-y? A. N-e-p-h-r-o-p-e-x-y.

521 Q. What is a nephropexy? A. Do you want me to stop at this point?

Q. No, go ahead and we will go back.

Mr. McLaughlin: Doctor, did you take all these things into consideration in making up your opinion?

The Witness: No, sir.

The Court: Read only those parts that you took into consideration in arriving at your diagnosis.

The Witness: All right, sir.

Mr. Offutt: He has already said he read it all.

Mr. McLaughlin: No.

Mr. Offutt: Just continue reading.

Mr. McLaughlin: No, no.

Mr. Offutt: I object to Mr. McLaughlin interrupting.

The Court: Just a moment. The Court gave a direction to the witness, and the witness will follow that direction.

Mr. Offutt: Why, of course, Your Honor.

The Witness: All right. She was admitted to the hospital complaining of severe labor pains; vaginal bleeding that had begun approximately two and a half hours before she presented herself at the hospital.

By Mr. Offutt:

Q. Are you reading that exactly as it is, sir? A. No.

Mr. Offutt: I think you should read it as it is. I
522 think he should read it as it is, Your Honor, the portion he took into consideration, and not change the reading. I object to changing the reading in it.

The Court: The witness will state everything that he took into consideration in arriving at his diagnosis, and until he finishes his answer, he will not be interrupted.

Mr. Offutt: May it be understood—

The Court: He will not be interrupted by either counsel until he finishes his answer.

The Witness: Thank you.

Mr. Offutt: May I object to that? Thank you.

The Court: You may proceed in your own way.

The Witness: All right. I will just state it in my own way.

This girl came to the hospital with labor pains; vaginal bleeding, and a history of subjective feeling, or she felt herself that she was pregnant. Her last menstrual period had been on the 20th of October, 1951.

She stated that a week before she came to the hospital she had taken quinine, three tablets daily, and castor oil for three days, and nothing since.

At that time she denied any attempt at abortion.

Her blood pressure was 140 over 100. Her pulse was 106. Her temperature was essentially normal.

Her abdomen showed tenderness, but it was all in 523 the lower abdomen.

Do you want me to carry this all the way through, Your Honor?

The Court: State everything that you took into consideration in arriving at your diagnosis.

Mr. Offutt: Your Honor, may I, just for the record, object to Your Honor carrying the interrogation and not permitting me to do it? Thank you, sir.

The Witness: She was examined on admission, not by me; and at that time the neck of her uterus was closed and her uterus was enlarged to the size of a grapefruit.

Her admitting white count was 16,000 with a shift.

Mr. Offutt: Just a minute. Your Honor, may I object to this portion which refers not to history but to the examination, and by someone else?

The Court: Objection overruled. You will note your objections, if there are any, after the witness completes his

answer. I do not want the witness interrupted until he finishes his answer.

You may proceed, Doctor.

The Witness: She didn't bleed much following that, and the next notation is when I examined her on the 21st.

At that time, as I have said before, I thought she had a peritonitis secondary to an induced abortion.

We quizzed her again—is it all right to go ahead
524 with all this?

The Court: Yes, you may.

The Witness: We quizzed her again as to whether an abortion had been attempted, and she said it had.

She was placed on antibiotics; treated rather vigorously, and her peritonitis subsided.

Her pregnancy was terminated on the 7th day of February, and she was discharged the 17th.

The Court: What do you mean by pregnancy being terminated?

The Witness: The products of conception were removed. Is that the answer that the Court wants?

The Court: You may proceed, Mr. Offutt.

Mr. Offutt: Beg pardon, sir?

The Court: You may proceed.

Mr. Offutt: Now, if Your Honor please, I object to Your Honor not permitting me to cross-examine the witness.

The Court: I am permitting you to cross-examine. You may proceed with your cross-examination.

Mr. Offutt: I mean just previously.

The Court: I am permitting you to cross-examine now. Proceed.

By Mr. Offutt:

Q. Now, Dr. Kilpatrick, on the date of admission what was the name of the doctor, as shown by the records there?

A. Which doctor?

525 Q. The doctor that took that history that you were referring to on the date of admission. A. Dr. Burke.

Q. Does he have an initial? A. J. Burke.

Q. And you were talking about an examination that you read from where you referred to the uterus being about the size of a grapefruit. Who was that examination made by? A. Dr. Barter and Dr. Burke.

Q. Do you have the date that was made? Is that in the record? A. Yes.

Q. What is the date? A. January 18th.

Q. You were referring to the—you said that on admission she denied any attempt at abortion. A. Right.

Q. Do you refer to that, you medical men, as denying any instrumentation? A. Yes.

Q. What words does the record use in that connection? Doesn't it say "denies any instrumentation?" A. Yes; denies instrumentation.

Q. That is on admission. When you saw her on January 21st, did you make notes on the record in your hand-
526 writing at that time? A. Yes.

Q. Would you look at your entry of the examination on January 21st, when you saw her? Have you got that place, sir? A. Yes.

Mr. Offutt: May I follow a moment?

The Witness: Is this permissible?

Your Honor, may he examine these records?

The Court: No.

Mr. McLaughlin: He has seen them already.

The Court: No, not unless you desire him to do so.

The Witness: No, I do not.

The Court: No.

527 Mr. Offutt: I object to the witness referring to them and then refusing to let me see that which he has referred to and admitted in evidence, and I say the Government has opened the door.

The Court: Will counsel come to the bench, please.

(Thereupon counsel approached the bench and conferred with the Court, in a low tone of voice, as follows:)

The Court: Mr. McLaughlin, I am in somewhat of a quandary here. Of course, these records are confidential, but having been used—

Mr. McLaughlin: I have no objection, Your Honor.

The Court: They having been used to refresh the witness' recollection, I think counsel has a right to see them.

Mr. McLaughlin: Yes, I agree with that.

The Court: You may go back to counsel table.

Mr. Offutt: Couldn't, or could?

The Court: Not the whole file.

Mr. Offutt: I didn't understand Your Honor; did you say couldn't, or could?

The Court: I shall rule that you may see those portions of the file which the witness used to refresh his recollection, but not other portions.

Mr. Offutt: Yes, sir. I didn't understand that he used anything to refresh his recollection. He ~~used~~ ^{could} read everything.

The Court: No. He summarized from the record the information that he used in arriving at his diagnosis. Those portions of the record I shall let you see, but not other portions of the file.

Mr. Offutt: Your Honor, while I am here, just so the record will be clear as to what my position was, I understood Your Honor to tell me not to speak while the witness was testifying.

The Court: Yes.

Mr. Offutt: And I was objecting to Your Honor refusing to let me ask my questions. It was your questions that the witness was answering.

The Court: That is correct. You may not interrupt the Court when the Court is examining a witness, and the Court has a right to ask his own questions.

Mr. Offutt: And I was objecting to the Court asking the questions and not letting me question the witness.

The Court: You may go back to counsel table.

(Thereupon counsel resumed their places at the trial table and the following proceedings were had in open court:)

The Court: Doctor, you may permit counsel to see those portions of the file to which you referred in answering questions while you were on the stand. Counsel is entitled to see those portions, but no other portion of the file.

.

532 Q. And did you consider those things which are in the record, in connection with your treatment and attention of the patient? A. Yes.

Q. And referring to the first one would you look at that one and read that progress note of that, the first one on January 18, 1952? A. The entire note?

533 Q. Yes, sir. A. That is essentially what I read a moment ago.

Q. I am just asking you about that. You took that into consideration, too, didn't you? A. Yes.

Q. Will you read that? A. Twenty-four year old, gravida 4, par 2, developed labor pains and slight vaginal bleeding approximately two and one-half hours prior to admission. Last menstrual period October 20, 1951.

There, Your Honor, may I ask a question?

The Court: Yes.

The Witness: There are notations about her past history in this note.

The Court: Well, did you take those into consideration in arriving at your diagnosis? If not why you need not read them.

Mr. Offutt: That was not the question I ask him first; that is not the question he is answering now.

The Court: What is the question?

Mr. Offutt: He said he took those into consideration in following the case along.

The Court: What is your question?

Mr. Offutt: I asked him to read that which he took into consideration, of the progress notes, on January 18, 1952, and that is what he is now reading from, those progress notes.

534 The Court: What is your point?

Mr. Offutt: I want him to read what is there, and he wants to ask the Court whether he should read what is there, but he had previously said he read them and considered them.

The Court: Don't be so nervous.

Mr. Offutt: I understand—I beg your pardon; I am not nervous.

The Court: I think you will have to change your tone.

Mr. Offutt: I don't mean it.

The Court: You may read all those portions of notes and entries of that day which you took into account in arriving at your diagnosis.

The Witness: All right. 1947 an abortion at six weeks.

1948 a term still birth.

1949 full term living child.

The week prior to admission took quinine tabs three daily and castor oil for three days; nothing since. Denies instrumentation.

Blood pressure 140 over 100. Pulse 106. Temperature 99. Abdomen supereubic tenderness, and slight bleeding. Sterile vaginal done by Dr. Barter.

By Mr. Offutt:

Q. Wait a minute. Did you skip something? A. Oh, I can read the impression of Dr. Barke.

535 Q. Isn't that on there, sir?

Mr. McLaughlin: I object to that.

By Mr. Offutt:

Q. I mean under January 18, that you were just reading. You said blood pressure—did you read about the lungs? A. Oh, lungs clear of percussion.

Q. And heart? A. Heart negative.

Q. Did you read all that was on there?

The Court: Where did you get that information?

Mr. Offutt: I beg pardon, sir.

The Court: Have you got a copy of those entries before you?

Mr. Offutt: I have some things here, I made notes on from information given to me.

The Court: Just a moment. Information from whom?

Mr. Offutt: Information from the hospital.

The Court: I think the hospital records certainly in this case are confidential.

Mr. Offutt: I submit that he has opened the door and waived the privilege by taking the stand and testifying about this. She has already testified about this. She can't open the door and close the door at the same time.

The Court: I think the Court should pass upon that, and not a custodian of records of the hospital.

536 Mr. Offutt: I am arguing to Your Honor, and I have some cases that I think will support.

The Court: I said yesterday that I think the custodian of the records of the hospital probably was not sufficiently instructed as to the confidential character of these records and made an unauthorized disclosure.

Mr. Offutt: I also had a subpoena, Your Honor, on them.

The Court: I explained yesterday that a subpoena is returnable before the Court, but does not given counsel the right to examine the records until the Court passes upon the question whether they may or may not be examined.

Mr. Offutt: But now he is using it to refresh his recollection.

The Court: Well, you may proceed.

I think we better give the jury a few minutes respite at this time.

Mr. Offutt: May we just read that one thing there?

The Court: No.

Mr. Offutt: Just that one line there?

The Court: No.

538 Q. When you saw the patient on January 21st, the first time, you questioned the patient, did you not, in connection with your treatment of her; isn't that right, sir? A. Yes.

Q. And then did you record anything in there in the hospital notes as to what had taken place in that connection, what the patient had told you? If so, will you tell us what you have?

The Court: First, answer the question yes or no.

A. I answered one question. Has he posed another one?

By Mr. Offutt:

539 Q. Did you record that—let me withdraw it and reframe it; I think it is badly phrased.

Did you make an entry in the records, as a result of your examination of and conversation with the patient, Mary Lee Ott, on January 21st, when you first saw her? A. Yes.

Q. Would you read what you have recorded there in that connection, sir? A. Denies instrumentation.

Q. After you had seen her on that occasion, on January 21st, did there come a time when you saw Mary Lee Ott again? A. Yes.

Q. Was that on the same day or a later day? A. Yes.

Q. Which was it? A. Same day.

The Court: You have already asked him and he testified that he saw her at least twice on that same day. Now, please don't go over the same ground more than once.

Mr. Offutt: May I see that entry you just read from, sir?

The Witness: Which one?

Mr. Offutt: The one you just read from; from the first time you saw her when you said something about "denies instrumentation."

The Witness: There, 1-21.

540 Mr. Offutt: Let me look at it a moment.

The Witness: Is it permissible for him to look at all this?

The Court: It is permissible for him to look at the entry you read.

The Witness: The entire entry?

The Court: The entire entry you read.

The Witness: I read only one sentence from the entry.

The Court: Well, he may see that.

The Witness: I just showed him that.

Mr. Offutt: I want to see it. And I want to look at it and he turned it down. May I see it, please?

The Witness: Right there, "denies instrumentation."

Mr. Offutt: Wait a minute; wait a minute.

The Witness: One sentence is all I read.

Mr. Offutt: Can I see that sentence, Your Honor? I submit I should see that sentence.

The Witness: I showed it to him.

Mr. Offutt: I see no purpose—may I see it? I see he has 20-20 vision, and I have to wear glasses. I assure Your Honor I didn't see it all.

The Court: Well, show it to him once more.

The Witness: Patient denies instrumentation.

Mr. Offutt: What is that right there (indicating)?

The Witness: Instrumentation.

541 Mr. Offutt: And what is that?

The Witness: "Now says no attempt at abortion made since mid December."

Mr. Offutt: That's right, and that is all in one sentence, what you just read.

The Witness: I don't know whether it is all in one sentence or not; my grammar isn't perfect.

"No attempt made since mid Decemoer, at which time took quinine," which I mentioned before.

Mr. Offutt: But I am talking about what you have on that entry there.

The Witness: All right; there it is (indicating).

Mr. Offutt: Your Honor, I asked the doctor to read the whole thing he has there what the patient says; it is all one sentence.

The Court: Mr. Offutt, I suggest that you go back to counsel table. I think you misunderstand the situation.

I ruled that under the law records pertaining to a veteran in a veterans' hospital, are confidential. The veteran does not waive the privilege when the veteran testifies pursuant to a subpoena and it not a party to the litigation.

Now, I will let you see those portions of the files which the witness himself has used to refresh his recollection, but nothing beyond that, and that the witness has just done.

Mr. Offutt: May I not see, also, Your Honor, that
542 which he has used and read, and considered in treating the patient and in basing his opinion on— he has already said he did consider everything there.

The Court: The whole file?

Mr. Offutt: Yes, he so stated.

The Court: I shall not permit you to see the whole file.

In response to a question you asked early this afternoon I directed the witness to read all those portions of that record which he used in arriving at the diagnosis that he stated on his direct examination, and he has already done that. You cannot go over it the second time. That part of the cross examination may not be repeated.

Mr. Offutt: Your Honor, I asked the witness what was her condition during all the time he treated her from the time she was admitted, the 20th of January until February 7th, and he answered that—

The Court: I have ruled, Mr. Offutt.

Mr. Offutt: May I have an exception and an objection on the ground that he has opened the door?

The Court: You may have an exception, and the objection is noted on the record.

Mr. Offutt: Your Honor please, that sentence which he just read, I object to him reading part of the sentence with-

out all of it. I ask Your Honor to look at it, and I say
 he did not read the whole sentence, and I want the
 543 whole sentence read.

The Court: He has a right to read, and in fact he
 was directed to read only those parts of the record that
 he took into consideration in arriving at his diagnosis.

Mr. Offutt: My question is not that, Your Honor.

The Court: I will not permit you to go beyond that—

Mr. Offutt (interposing): I object, Your Honor.

The Court (continuing): And I will not permit you to
 go on the same ground in another form.

Mr. Offutt: I object to the limitation.

The Court: Turn to the page from which you read—

Mr. Offutt: It is under the doctor's progress notes.

The Court: I am asking the witness.

Mr. Offutt: Oh, I beg your pardon.

The Court: Point out that sentence to the clerk.

(The witness indicated the portion referred to, to the
 clerk.)

The Court: In order that there may be no misunder-
 standing, you may read those two and a half lines again.

The Witness: All right, sir.

Mr. Offutt: May I look at it as he reads it?

The Court: No.

Mr. Offutt: Your Honor, there has been a mistake be-
 fore, and I submit I am entitled to see it.

The Court: You are entitled to see it, but you
 544 may not look over his shoulder while he is reading.

Mr. Offutt: That's all right, Your Honor, if I may
 see it.

The Witness (reading): "Patient denies instrumenta-
 tion. Now says no attempt at abortion made since mid De-
 cember at which time took quinine tabs. Three for three
 days and daily teaspoon castor oil and three hot baths."

Mr. Offutt: Now, can I see it, Your Honor?

The Court: You may not see that whole page.

Mr. Offutt: I just want to see that one.

The Court: You may come around to the witness stand and the witness will show you those two and a half lines, and that is the last time you can see it.

Mr. Offutt: I beg your pardon, sir; I didn't hear Your Honor.

The Court: I said that is the last time you can see it.

By Mr. Offutt:

Q. Now, did you find that particular progress note under that, as a result, after you had made that examination and interviewed the patient? A. Yes.

Q. About what time of day was that on January 21st? A. I don't recall.

Q. Can you refresh your recollection any way from the notes and if so, tell us? A. No.

Q. What was the patient's condition, did you find?

A. I found her on the 22nd to be improved over the day before.

Q. And on the day before, what was her condition?

Mr. McLaughlin: You have been all over that, I object, if Your Honor please.

The Court: You have been all over that.

By Mr. Offutt:

Q. I will ask you specifically. In connection with the treatment of this patient wasn't there a tube inserted in the patient? A. Yes.

Q. Didn't the patient withdraw and pull out that tube—I mean replace it, pull it out, withdraw it, replace it, time and time again, and go into tantrums? A. It doesn't say time and time again here. The tube was inserted through the nose for peritonitis.

The Court: The tube was inserted?

The Witness: For peritonitis.

The Court: Through the nose?

The Witness: Yes.

By Mr. Offutt:

Q. Didn't the patient have a tantrum?

Mr. McLaughlin: I object to this.

The Court: I don't think this is material. The tube through the nose has nothing to do with the issue of this case.

Mr. Offutt: There may be something else I want
559 to ask about—

Mr. McLaughlin: I object to this, if Your Honor please.

Mr. Offutt: Is Your Honor limiting that examination? I object to being interrupted at this time.

The Court: You may ask the next question.

By Mr. Offutt:

Q. Didn't the patient become highly upset and nervous?

A. Yes—according to the records. I didn't see her when she was in that state.

Q. Didn't you base your opinion and your treatment upon this patient by relying on those entries in the record? A. No, not entirely.

The Court: Just a moment. I allowed this witness, or I allowed you to examine this witness concerning those portion of the record which he used in arriving at his diagnosis. You are not entitled to read contents of other portions of the record of Mount Alto Hospital.

By Mr. Offutt:

Q. Did you not, Dr. Kilpatrick, in connection with the treatment of this patient, study the entire chart of this case to know about the patient? A. Yes.

Q. And did you not, in connection with that study of the chart of the patient, read that the patient had been treated in a psychiatric ward in 1950, sir?

560 The Court: Just a moment. I am excluding that. That is not proper cross examination.

I told you that only those portions of this file are available to you and open to you, which this witness used in arriving at his diagnosis.

On direct examination he wasn't asked to testify as to the course of treatment that he gave to his patient, and you may not examine those portions of the file which relate to treatment. He was only asked to give his diagnosis.

Mr. Offutt: I thought he was asked, Your Honor, the condition of the patient during the whole period of time, every day.

The Court: That has nothing to do with the matter brought out on direct examination. The direct examination was strictly limited to the diagnosis, and the doctor told us what his diagnosis was, and you have a right to complete cross examination as to the basis for that diagnosis, but not beyond that.

By Mr. Offutt:

Q. On February 7th you said that the contents were removed. What contents were you talking about, when the patient was taken to surgery? A. The products of conception.

Q. And what do you call that operation? A. It is the removal of the products of conception.

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565 Thursday, June 5, 1952.

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568 Mr. Offutt: May we approach the bench?

The Court: Yes, indeed.

Mr. Offutt: If the Court please, my attention was called to several newspaper articles which have appeared in the course of this trial, one particularly which has the remark about Your Honor and myself.

The Court: Yes, I have read them. Now, what is your point?

Mr. Offutt: May I put this in the record, Your Honor?

The Court: What, the articles?

Mr. Offutt: No, my objection fully and my point fully in the record so that it will be complete at this time.

The Court: Yes, but first tell me what your point is.

Mr. Offutt: My point is that this is prejudicial and I want to make a motion for a mistrial, based upon the things which they have noticed.

569 The Court: Here is what you can do—

Mr. Offutt (interposing): And I am stating this must have been so, from the standpoint of the people in the court—I just noticed that the reporter who is representing this paper was in the courtroom—

The Court: Just a minute.

Mr. Offutt (interposing): And the one who was interviewing—

The Court: Just a moment.

Mr. Offutt: I beg your pardon.

The Court: What is the ground of your motion, that the articles are prejudicial?

Mr. Offutt: And Your Honor's conduct, according to the way it has been interpreted by the paper, and according to the way the jury must have received it, is prejudicial to the interests of my client.

The Court: I think you have got several things all confused, and I want to disentangle the threads.

You are making a motion for a mistrial on the ground that newspaper articles have appeared, in the course of the trial, that are prejudicial to the defendant. Is that it?

Mr. Offutt: Yes, Your Honor. I want to see if any of the people on this jury have read it. I call Your Honor's attention to one thing: The juror on the corner has been reading papers consistently, the No. 1 alternate juror—

570 The Court: I hope that all the jurors are newspaper readers.

Mr. Offutt: They are.

The Court: Because if they are not, they are too ignorant to serve on a jury. However, that is no proof that they read the articles about this case, because the articles about this case are very short and are mostly on inside pages, and I have instructed the jurors not to read the articles.

Now, I am going to deny the motion for a mistrial on the ground that the Court cannot control the press. It has been held not to be contempt of court for the newspaper to publish articles that are prejudicial to a party litigant. Therefore, since I cannot control the press, I cannot declare a mistrial on the ground of the appearance of
571 prejudicial articles, because if a mistrial is declared and later on another trial is had, the same thing may happen.

In order to protect your record, if you wish you may hand these clippings to the clerk. I will mark them as exhibits for use in connection with your motion.

Mr. McLaughlin: In addition to that—

Mr. Offutt (interposing): That isn't my entire motion.

Mr. McLaughlin: I say in addition to that Your Honor has instructed this jury from the very beginning not to read the newspapers.

Mr. Offutt: And that's the reason I say it is improper for the jury to read those accounts, in view of Your Honor's admonition, and I ask Your Honor to inquire of the jury if they have read the articles and if they have been influenced by them.

The Court: I will not do it.

Mr. Offutt: I move Your Honor to inquire of the jury if any of them heard the outburst or anything that occurred when Mary Lee Ott was yelling and screaming at me and followed me from this courtroom out into the corridor and into the Clerk's office.
572

The Court: I shall decline to do so.

Mr. Offutt: I didn't state all the basis or grounds for my motion for a mistrial, and if Your Honor would let me do so for the record—

The Court: Are there any other grounds?

Mr. Offutt: Yes, sir.

The Court: I won't let you argue it, but if you have another ground you may state it.

Mr. Offutt: Yes, sir.

The Court: You may state it.

Mr. Offutt: The ground for a motion for mistrial at this time is that during the proceedings in court here Your Honor admonished me, raised your voice, and by gestures—

The Court: Does that appear in the article?

Mr. Offutt: Your Honor, yes, indeed, that is the reason I am objecting to it.

The Court: Now you are arguing the motion. You may go back to counsel table.

Mr. Offutt: I am telling you the basis for it.

The Court: No. You have made your record and that is enough. You may go back to counsel table.

Mr. Offutt: Just so I may have my point, I just want to state my objection to Your Honor's refusal to let me make a proffer.

573 The Court: Objection noted. Go back to counsel table, gentleman.

Mr. Offutt: Can I make another motion, if Your Honor please?

The Court: Yes.

Mr. Offutt: If Your Honor please, during the examination of the witness Ott there were a number of interruptions, and this motion that I just made was referring—

The Court: What is the next motion? State what your motion is. You said you wanted to make another motion.

Mr. Offutt: That is right, Your Honor.

The Court: What is the motion?

Mr. Offutt: My motion is to replace—recall, rather, Mary Lee Ott on the stand, and may I state the basis for it?

The Court: For what?

Mr. Offutt: For the motion.

The Court: What do you want to ask her?

Mr. Offutt: I want to ask her some things that I have overlooked in the cross examination, because of the interruptions that threw me off.

The Court: What are the things you want to ask her?

Mr. Offutt: If Your Honor will permit me to get the notes I will tell Your Honor.

The Court: Isn't that the same thing you asked yesterday?

574 Mr. McLaughlin: Yes, Your Honor.

Mr. Offutt: No, it isn't, and there is something also that has come to my attention since yesterday—

The Court: Very well. Go ahead and get your notes.

Mr. Offutt: Thank you.

(Thereupon defense counsel returned to the trial table, after which he approached the bench, and the following occurred:)

Mr. Offutt: I didn't hear what was taking place. What was it?

The Court: I think this is a conference between the Court and the reporter.

Mr. Offutt: In connection with this case?

The Court: No. It was a private conference between the reporter and the Court.

Mr. Offutt: Was it in connection with this case?

The Court: You are insolent in asking that. I said it was a private conference between the reporter and the Court.

Mr. McLaughlin: May I say for the record, in view of the motion made by my friend about Your Honor being prejudiced and loud talking, may I put this on the record, that Mr. Offutt's attitude toward the Court during this proceeding is highly contemptuous, and yelling at the wit-

nesses sitting in the front row, and I say his actions amount to contempt of court.

575 The Court: Proceed with your motion.

Mr. Offutt: May I say, my notes are mixed up here; may I develop this a little later?

The Court: Yes.

Mr. Offutt: Thank you very much.

Dr. John Taylor Kilpatrick

having been previously sworn, resumed the stand and testified further as follows:

Cross Examination (Continued)

By Mr. Offutt:

585 Q. Dr. Kilpatrick, do you know Mr. John Spriggs—
586 may I look and see if he is here, Your Honor—do
you know an attorney named Mr. John Spriggs? A.
Yes.

The Court: I think you are standing in front of one of the jurors. I suggest that you move over a bit.

Mr. Offutt: I thought I was getting in exactly the same spot where Mr. McLaughlin was standing, Your Honor.

The Court: No, you were standing in the line of my vision so I couldn't see one of the jurors.

Mr. Offutt: Is this all right, Your Honor?

The Court: Yes.

587 Mr. Offutt: Mr. McLaughlin is objecting to my standing here; he is saying something.

The Court: Are you through with this cross examination?

Mr. Offutt: No. Mr. McLaughlin objected; what shall I do about it?

The Court: Are you through with this cross examination?

Mr. Offutt: No.

The Court: Then ask the next question.

589 Q. Do you recall when Mr. Spriggs and I were to see you, together, after discussing this case for some time did I not ask you something about the physical examination which you made of the patient? A. I don't remember that.

The Court: You may ask this witness about matters that he told you, not about matters that you told him.

Mr. Offutt: Can I ask about matters he didn't want to tell me about?

The Court: No. I am ruling only on one thing at a time.

Mr. Offutt: All right, Your Honor.

The Court: I am ruling out that last question because it relates to something that you told him.

Mr. Offutt: Oh, no; something he told me.

590 The Court: No, no.

Mr. Offutt: All right. Can I ask him?

The Court: Ask another question, if you wish.

By Mr. Offutt:

Q. Before you saw Mr. Spriggs and before you saw Mr. Spriggs and I together, and when I say Mr. Spriggs, I mean alone first, and then saw us together, you had talked to Mr. McLaughlin before that time, had you not, sir? A. I believe I had.

Q. And didn't he tell you at that time not to discuss this matter with anybody? A. No.

The Court: Just a moment. I am going to exclude that.

I want to say this, that if this doctor had declined to disclose any information to you, Mr. Offutt, that the doctor was acting properly because it was his duty not to disclose any confidential matters relating to any one of the patients.

By Mr. Offutt:

Q. Did you talk to Mr. McLaughlin about the patient?

A. No. My conversation with Mr. McLaughlin was when I would have to testify, sir, to plan my work.

Q. Did you talk to Mr. McLaughlin about this case before you took the stand at this trial?

The Court: You have already asked him that and he has answered the question. Now you have to have some
591 terminal facilities.

Mr. Offutt: Yes, but I should have some reasonable limits in examination, I submit, Your Honor.

The Court: You have been cross examining this witness at great length, and I will not permit you to repeat any matters.

Mr. Offutt: Its very difficult to keep my power of thought—I don't remember what I asked—I don't mean to, Your Honor, I am sure.

The Court: I remember what you have asked him; you, yourself, should certainly be able to remember what you asked him.

Mr. Offutt: Well, I am sorry if my memory isn't as good as your Honor's, sir.

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The Court: Go ahead.

Mr. Offutt: Oh. Your Honor, when you move like that it startles me and disturbs me—

Mr. McLaughlin: Oh, I object to this.

Mr. Offutt (continuing): —I know you don't intend to do it.

The Court: You mean that when I shift in my
592 chair that disturbs you?

Mr. Offutt: When you jump from the seat up to the desk, it does, because most of the time you reprimand me or stop me, and I am very much upset and nervous about this.

The Court: Don't be absurd, Mr. Offutt.

Mr. Offutt: I am not absurd, Your Honor, I assure you.
The Court: Don't be absurd.

Mr. Offutt: I am not absurd, Your Honor, that is my feeling.

The Court: Unless you proceed with this cross examination I shall excuse the witness.

Mr. Offutt: If you will just be patient with me, Your Honor.

The Court: No; you tax my patience.

Mr. Offutt: Why, Your Honor? Will you please tell me?

Mr. McLaughlin: I object to this, Your Honor.

Mr. Offutt: I am trying to do my best.

The Court: Unless the next utterance that comes from your lips is a question addressed to this witness I will excuse this witness.

602 Q. Did Dr. Paul Bender ever attend this lady at any time after she got in the hospital? A. Certainly.

Q. And what date did he attend her.

The Court: That is not proper cross examination. This witness testified to what he did and what he found, and you may cross examine him as to that, but you may not
603 cross examine this witness about what some other doctor did.

Mr. Offutt: I don't want to know what he did; I just want to know if he examined her.

The Court: You may ask that doctor, if you wish, but you may not ask this doctor.

By Mr. Offutt:

Q. Tell us the names of all the doctors who had anything to do with the treatment of this patient while she was in the hospital?

The Court: I shall exclude that question.

Mr. Offutt: May I finish my question?

The Court: I think you did.

Mr. Offutt: No, Your Honor, I didn't; I am sorry.

The Court: Very well; you may finish your question.

By Mr. Offutt:

Q. Continuing the question—from the date of her admission, January 18, 1952, until the discharge February 17, 1952?

Mr. McLaughlin: I object to that, Your Honor.

The Court: This question is excluded as beyond the scope of the direct examination.

By Mr. Offutt:

Q. Who saw the patient besides Dr. Burke, if anyone you know of, before?

The Court: I have excluded that whole line of
604 examination. Don't ask any more questions along that line.

Mr. Offutt: May I know what line you are talking about so I won't transgress it?

The Court: My ruling is that you may not ask this witness about what any other physician did or said in connection with this patient?

Mr. Offutt: May I ask him the names of any other doctors that appear in the record?

The Court: No. I excluded that.

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607 Q. Do you know Bill Jones, or William E. Jones, pharmacists mate third class in the United States Navy, stationed at Quantico, Virginia, sir? A. I have met him.

Q. And when did you meet him, sir?

The Court: That is irrelevant. It has nothing to do with the matters brought out on direct examination.

Mr. Offutt: He has already answered it. May I ask one further question about it?

The Court: No, you may not.

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608 Q. During the stay in the hospital, at Mount Alto Hospital, and during your treatment, you never saw William E. Jones or heard his name mentioned in any way, did you, sir?

Mr. McLaughlin: I object to that.

The Court: I am going to exclude this as immaterial and irrelevant.

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609 Q. And when that statement was made to her, you were telling her about—you told her how serious her condition was, did you not? A. Yes.

Q. Why would it be to her best interest—

The Court: I will exclude that.

By Mr. Offutt:

Q. In what way could it be to her best interest, would you explain to the jury?

Mr. McLaughlin: I object to this.

The Court: I am going to exclude that.

Mr. Offutt: I haven't even said the question yet, Your Honor. Can I finish the question? Can I get the question in?

610 The Court: Make it short, please.

Mr. Offutt: I wanted to get the question the way I want to ask it and then have Your Honor rule on it. May I do that?

The Court: I am going to exclude this question.

Mr. Offutt: I haven't asked it—all right, sir.

May I make a proffer of the question I want to ask?

The Court: No. I am excluding it. You have gone far enough for me to see what the question is going to be.

By Mr. Offutt:

Q. What was the patient's temperature when you told her that? A. I don't know.

Mr. McLaughlin: I object to that.

By Mr. Offutt:

The Court: I think that is immaterial. I will exclude it.

Q. How many times did you see her on that day, could you remember?

The Court: You just asked the witness that yesterday and he answered.

Mr. Offutt: I want to ask him again today.

The Court: Well, you may not ask him again.

By Mr. Offutt:

Q. Can you refresh your recollection from the file?

611 The Court: He doesn't have to refresh his recollection. He answered your question yesterday.

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613 Redirect Examination

By Mr. McLaughlin:

Q. You were asked by Mr. Offutt that during the time that the girl was in the hospital whether or not any doctors had suggested to her about an abortion. In your conversation with the girl did she at any time tell you that a doctor had performed an abortion on her? A. Yes.

Q. And did she tell you who that doctor was? A. When I asked her?

614 Q. Yes. A. No.

Q. Did she later, in your presence, say who that doctor was?

Mr. Offutt: If Your Honor please, this has all been gone over in direct examination.

The Court: No, this is redirect because you opened up the subject on cross examination. Objection overruled.

Mr. Offutt: I object.

By Mr. McLaughlin: , '

Q. Did she later say, in your presence?

Mr. Offutt: If Your Honor please, I object to the Court that I am interrupted by counsel when I am addressing the Court.

The Court: Objection overruled.

Mr. Offutt: I object to being interrupted.

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615 The Court: Is there anything further with the witness?

Mr. Offutt: I would like to ask a couple of questions.

The Court: Mr. Offutt, I want to suggest to you most emphatically that you may not use the tone of voice that you just now used in addressing the Court. You must not transgress my admonition.

Mr. Offutt: If Your Honor please, I don't mean—I raise my voice a little bit—what is it? Is it the raising of the voice, the intonation? What is it, I can't understand it.

The Court: My statement is sufficient. You don't show the proper manner and proper respect for the Court.

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616 Recross Examination

By Mr. Offutt:

Q. Dr. Kilpatrick, didn't you tell me, in the presence of Mr. Spriggs, that this patient was most-uncooperative and got into a tantrum—A. I did not.

Q. Wait a minute until I am through. A. Excuse me.

617 Q. And withdrew and inserted a tube into herself trying to do something?

The Court: Just a moment.

Mr. McLaughlin: Let him answer.

Mr. Offutt: I object to him interrupting Your Honor.

The Court: The Court can protect itself.

Did you ask this witness about that on redirect examination?

Mr. McLaughlin: Yes, Your Honor. Let him answer.

The Court: Very well.

Mr. McLaughlin: Let him answer.

The Court: I will allow the question.

The Witness: May I have the question read to me now?

Mr. Offutt: I will withdraw the question.

Mr. McLaughlin: No, I want an answer.

Mr. Offutt: I have withdrawn the question.

Mr. McLaughlin: I want an answer.

Mr. Offutt: I have a right to withdraw the question.

The Court: I think in fairness to the jury, once the question has been asked, it should be answered.

Read the question. The Court will allow it.

Mr. Offutt: I object to Your Honor saying that to the jury.

The Court: The Court will —

618 Mr. Offutt (interposing): May I say for the record —

The Court: Mr. Offutt, the Court is trying to be patient with you but there are limits to the Court's patience. You must behave yourself.

Mr. Offutt: I want to make —

The Court: You will sit down.

Mr. Offutt: May I come to the bench?

The Court: No, you may not. The reporter will read the question.

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619 Mr. Offutt: I am trying to break it down so I can get it up to be heard.

The Court: I am excluding that question.

By Mr. Offutt:

Q. Didn't you, Dr. Kilpatrick, discuss in connection with this incident of the tantrum, and what I just asked you about, didn't you discuss that and then say that the patient, from her history, had tried to get them to induce an abortion on her, in the Naval Medical Hospital?

Mr. McLaughlin: I object to that. It is not responsive. The question is whether or not the doctor told him that this girl inserted that tube into her vagina.

The Court: He has answered that question. This is another question. It is a little difficult to comprehend it, but did you understand it?

The Witness: No, I didn't.

The Court: I think we better have the question read.
(Pending question read.)

The Witness: Your Honor, he has about a dozen things in there. Could he break it down and give it to me simpler?

The Court: No. Did you make the statement?

The Witness: No, I did not.

By Mr. Offutt:

Q. Doesn't the history in the hospital record show that, that you read and used in your diagnosis and opinion?

620 Mr. McLaughlin: I object to that. He is asking the question whether this man said it and he said no, and that is enough.

The Court: He has already answered.

Mr. Offutt: I am asking, doesn't the history record in that file that he has used, so state?

Mr. McLaughlin: I object to that.

The Court: State what?

Mr. Offutt: That she had tried to induce the doctors in the Naval Medical Center, in 1950, to perform an abortion on her?

Mr. McLaughlin: 1950?

The Court: 1950, I think that is an outrageous question to ask.

Mr. McLaughlin: He is in contempt of court, Your Honor.

The Court: It has nothing to do with the issue of this case.

I think a witness—I am not referring to this witness—but I think a witness is entitled to some protection and I don't think such questions should be asked about.

Mr. McLaughlin: And I think my friend is in contempt of court, Your Honor, because the question asked this witness is pertaining to this abortion in January, whether or

not he told Mr. Offutt that this girl performed or attempted to perform this abortion by inserting the glass tube.

621 My friend knew what we were talking about and

I say in reference to this incident that his imagination is running away from him; he is in contempt of court in asking the question.

The Court: I think the question is highly improper, and your point is well taken, Mr. McLaughlin.

Mr. Offutt: May I be heard?

The Court: And you will recall, in connection with the cross examination of Mrs. Ott, I ruled at the bench you could not ask about something that happened in 1950.

Mr. Offutt: She testified about it herself, Your Honor.

The Court: Have you any more questions?

Mr. Offutt: May I be heard now?

6 The Court: No, you may not.

Mr. Offutt: I cannot be heard? I object.

The Court: A person called to testify as a witness is entitled to some degree of privacy in respect to matters that are not relevant.

Mr. Offutt: This man, this defendant, is entitled to some protection in this case.

The Court: Yes, he is. He is entitled to make his defense. The question is whether he performed the two abortions charged in this indictment in 1951 and 1952. Anything that happened in 1950 is absolutely irrelevant.

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624 **George A. Christenson, Jr.,**

having been previously sworn, resumed the stand and testified further as follows:

Cross-Examination

By Mr. Offutt:

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632 Q. Didn't you refuse to sign this statement until you had been promised—strike that—weren't you promised—

The Court: Don't say "weren't you." You must ask him "were you," but don't assume a fact in your question concerning which there is no testimony in the record.

633 By Mr. Offutt:

Q. Were you not, or were you, promised that a charge against you would be dismissed if you would sign a statement and help them to convict Dr. Peckham in this case?

A. I have never been promised anything regarding this case whatsoever, for testifying or for not testifying, by anyone.

The Court: Will counsel come to the bench?

Mr. Offutt: Your Honor, can't I—

The Court: Will counsel come to the bench?

(Thereupon, counsel approached the bench and conferred with the Court, in a low tone of voice, as follows:)

The Court: What basis have you for asking that question?

Mr. Offutt: They can hear you out in the courtroom; there isn't any purpose in coming to the bench—

The Court: What is the basis—

Mr. Offutt (Interposing): I object to a loud tone of voice.

The Court: What basis have you for asking that question? I will ask you that in open court, if you persist.

Mr. Offutt: I am willing for you to ask me in open court.

The Court: Proceed.

Mr. Offutt: I object to the constant threats by the
634 Court in this case to intimidate me. I have a duty to perform, and I submit—

The Court (Interposing): But you must perform it in a lawyer-like and ethical-like manner, which you have not been doing.

Mr. Offutt: People in this court have called my attention to the fact that you have raised your voice and gesticulated—

The Court (Interposing): You have been very discourteous to the Court, Mr. Offutt.

Mr. Offutt: I submit, if Your Honor please, and if there is any question I would like to have the people in the court—

The Court: I am not going to take a referendum vote on that.

Mr. Offutt: No, I know you are not, but I have a right to object and it is my duty, and I wish you would give me an opportunity.

The Court: But you must do it in a lawyer-like and ethical manner.

I have called you to the bench for the purpose of asking you what basis you have for asking this question.

Mr. Offutt: This indictment against him was dismissed on January 30, 1952

The Court: What indictment?

Mr. Offutt: The one—there was a pending case against him, which was dismissed on January 30th—let me
635 look at the record and I can tell you.

The Court: I am asking you, what basis you had for asking this question, because there is an insinuation in it. You have a right to ask that question, but you must—

Mr. Offutt (Interposing): If Your Honor please, I was informed—

The Court (Continuing):—but you must have some basis for it.

Mr. Offutt: I have information that this man would not talk to them and would not give them a statement, and he was told that if he would help them to get a conviction—and also Mr. Mary Lee Ott, if she would cooperate with them and help them, they would have the case pending against him dropped and he would make parole.

I have subpoenaed the parole records, and the parole officer won't let me see them.

I have information that when Mary Lee Ott was
636 at the hospital the parole officer called and contacted her and it was in connection with his parole, and she

would not sign a statement and she would not do anything until she talked to the officers about that.

The Court: Who, according to your information, made any promise to the witness Christenson?

Mr. Offutt: I can't determine who it was—the way the statement was made, they were told and promised—

The Court: Who made that promise, according to you?

Mr. Offutt: If I had been permitted to put Mrs. Ott back on, I would ask her, and she has talked to the parole officer and she has talked to Mr. McLaughlin and someone has promised her—this was back in January—

The Court (Interposing): You said back in January you were informed that someone promised the witness Christenson—I am taking one thing at a time—that a charge against him would be dismissed if he made a statement. Who, according to your information, made that promise to Christenson?

Mr. Offutt: Someone who interviewed him.

The Court: Do you know who it was?

Mr. Offutt: I don't know the names of them.

The Court: Who gave you that information?

Mr. Offutt: Someone who overheard Mrs. Ott—if Your Honor please, I don't think I should divulge my defense here at this time, and I object to Your Honor requesting me to do it.

637 You won't even let me look at the records. I could get the information if I could look at the record.

The Court: Do you care to disclose to the Court who gave you that information?

Mr. Offutt: No, sir.

The Court: I will not compel you to do so. You may go back to counsel table.

Mr. Offutt: If Your Honor please, can I make one other motion while I am up here—

The Court: Yes.

Mr. Offutt: —it is very difficult to try this case—

The Court: What is your motion? It is very difficult for the Court, also.

Mr. Offutt: I assure you I am not difficult.

The Court: Yes, you are.

Mr. Offutt: I resent that. You don't tell me in what respect—I will do what you tell me to—you even accused me, you said I couldn't be so stupid. A lawyer at the Bar should not be permitted to practice if he doesn't—

The Court: What is the motion you wish to make?

Mr. Offutt: Your Honor, the motion I make, Your Honor, now is to permit me to examine this witness, without interruption, and without these statements before the jury.

The Court: That is not a motion. You may go back to counsel table.

638 Mr. Offutt: I want to make a motion for a mistrial—

The Court: Motion denied.

Mr. Offutt: —because of your—I was going to state the grounds—all right.

The Court: Motion denied.

Mr. Offutt: I object to Your Honor's refusal to let me state the grounds and make the representation to the Court.

The Court: Mr. Offutt, if I should grant a mistrial here, that mistrial would be brought on by your own misconduct, and I would simultaneously punish you very seriously.

Mr. Offutt: Will you tell me what the misconduct is?

The Court: I am not going to give you a bill of particulars at this time. You may go back to counsel table.

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642 Q. Did Mary Lee Ott live with Bill Jones? A. Who is Bill Jones?

Mr. McLaughlin: I object.

The Court: Objection sustained. That has nothing to do with the witness.

By Mr. Offutt:

Q. At 3935 Georgia Avenue, Northwest, isn't it a fact that Mary Lee Ott was living there with Bill Jones and not you?

Mr. McLaughlin: I object to this, if Your Honor please.

Mr. Offutt: I will withdraw it, then, if he objects.

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643 Q. Did you ever ~~meet~~ William E. Jones? A. Yes, I did.

Q. When did you meet William E. Jones? A. I don't remember exactly when it was. I think sometime in August or September.

Q. Of what, 1951? A. Yes, that is right.

Q. And was that while you were living on 18th or 16th, whichever street is the correct address? A. No, it was while we were living on Georgia Avenue.

Q. Did you know him first or did Mary Lee Ott know him first?

Mr. McLaughlin: I object to this. I can't see the materiality.

The Court: Objection sustained.

By Mr. Offutt:

Q. Is it a fact to your knowledge—to your knowledge, now—you moved out of 3935 Georgia Avenue and William E. Jones moved in and was known under the name of Ott?

Mr. McLaughlin: I object to this, Your Honor.

The Court: Well, you have got two questions in one. Suppose you split the two.

644 Mr. Offutt: All right, Your Honor.

By Mr. Offutt:

Q. Isn't it a fact that William E. Jones moved in and lived with Mary Lee Ott at 3935 Georgia Avenue?

Mr. McLaughlin: I object to this.

The Court: Objection sustained.

654 Q. Wasn't the actual purpose of your asking Mr. Graff to make that call was so you would find out exactly what Mrs. Mary Lee Ott had testified in court, so that you would be prepared to go along and not conflict with her testimony? A. No, that wasn't the purpose.

Q. Isn't it a fact that you have been promised—

The Court: Mr. Offutt, you have the statement made by this witness to the police, back in January. If there is any conflict between that statement and the testimony that he has given on the witness stand, you may interrogate him.

655 Mr. Offutt: And I will do it in due time. Could I conduct my examination the way I want to do it. Your Honor, without being interrupted?

The Court: Yes, you may.

Mr. Offutt: I object to these interruptions.

The Court: But, you must stay within the framework of evidence.

Mr. Offutt: I will do it, Your Honor.

The Court: Proceed

By Mr. Offutt:

Q. Mr. Christenson, you testified yesterday that you went to see the doctor, isn't that right? A. That is right.

Q. And you went to see the doctor about having an abortion performed on your wife, isn't that right? A. That is right.

Q. You told him it was your wife? A. That is right.

Q. She was not your wife, isn't that right? A. That is right.

The Court: We have been over that; she admitted she was not his wife.

By Mr. Offutt:

Q. And you never understood it to be any common law marriage at that time? A. As a matter of fact, I did, yes.

670 (The proceedings were resumed at 2 o'clock p. m., at the expiration of the recess.)

The Court: You may proceed.

Mr. Offutt: If Your Honor please, may I approach the bench for a moment?

The Court: Yes, indeed.

(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice, as follows:)

Mr. Offutt: If Your Honor please, I move that your Honor refer this matter to the District Attorney relating to this witness George Christenson, as you did in the Whiteside case immediately after his testimony, and after this case is concluded.

The Court: What Whiteside case?

Mr. Offutt: Whiteside—that is the case where your Honor heard where the officer was charged with beating this man up, this colored man, just recently.

This man is obviously involved in this as a participant, under his own testimony—Mr. Christenson obviously is involved in it, and if what he says is true, he certainly is guilty of participating in the crime, and is indictable.

The Court: I do not think that such a motion is proper or appropriate. That is not a matter for defense counsel.

671 Motion denied.

Mr. McLaughlin: This matter has already been presented to the Grand Jury, your Honor.

Mr. Offutt: If your Honor please, I am sure that there was never any case presented involving this man.

I do not know how Mr. McLaughlin would know that.

The Court: Now, Mr. McLaughlin is well known to this Court as a man of probity, and when he makes a statement the Court will accept it as fact.

Mr. Offutt: Will he tell the Court that he testified before

Mr. McLaughlin: I say the facts of this case have been presented to the Grand Jury.

The Court: Very well.

Mr. Offutt: That is what I was talking about, your Honor.

The Court: In any event, it is not a matter for defense counsel to concern himself with, so far as this trial is concerned.

Mr. Offutt: I was defending the man and I thought it was my duty to make that motion, your Honor, at this time.

The Court: I am denying the motion. It is not a matter for defense counsel to concern himself with. It has nothing to do with the defense of this defendant.

You may go back to the counsel table.

672 Mr. Offutt: Now, one other thing; If your Honor please, I move for a mistrial, as I was making a motion at the close of today's session before the noon recess, while I was in the middle of the motion, your Honor stood up, left the bench, and waved your hand and motioned me to stop, in the presence of the jury.

The Court: I left the bench because the marshal had proclaimed a recess. You have no right to start making a motion after the marshal proclaims a recess by the direction of the Court.

Mr. Offutt: Did your Honor act on my motion?

I just made a motion for a mistrial because of that, your Honor.

The Court: I beg pardon?

Mr. Offutt: I take it your Honor denied my motion.

The Court: I am denying the motion. I think I will go through the transcript and make up a score card of the number of motions you made for mistrial during the course of this trial.

Mr. Offutt: I object to that. I think your voice carries more than your Honor realizes.

Mr. McLaughlin: I understand, your Honor, that
673 he served a subpoena on Mr. Ott at noontime.

The Court: Well, they have a right to do that, of
course.

679 Q. I notice you, too, wear glasses this time; right,
sir? A. Yes.

Q. Did you have glasses on before lunch? A. I don't
think I had them on when I was on the stand.

Q. That is what I am talking about.

Now, do you need those glasses to see?

The Court: Now, just a moment. I do not think that is
material.

Mr. Offutt: Well, I think—may the record show that he
has them on now?

The Court: No. The record may show no such thing. I
think that is immaterial and irrelevant.

I sometimes wear glasses and sometimes I take them off,
and that is not material, and apparently this witness
does, too.

680 Mr. Offutt: I wear them because I have to use
them to read.

Mr. McLaughlin: I object to why you wear them.

Mr. Offutt: I take it your Honor uses them to read.

The Court: Now, proceed, Mr. Offutt, or I will terminate
this cross examination now.

By Mr. Offutt:

Q. You have to wear glasses because of your vision,
don't you, sir?

The Court: No—

Mr. McLaughlin: I object to this, your Honor.

The Court: I am going to exclude that. It is none of
your affair why he wears eyeglasses.

Q. Did you read it? A. No.

Q. Where did you see the statement? A. It was in the hands of a detective.

Q. How did you know it was the statement of Mary Lee Ott, if you didn't read it? A. He just mentioned that he had her statement there, and had it in his hand.

Q. You did not see the name on it at all? A. No, I didn't.

Q. So, as a matter of fact, you don't know whether it was the statement of Mary Lee Ott; is that what you are saying?

682 Mr. Laughlin: He has testified to that. He said what purported to be.

The Court: I will let him answer.

Mr. Offutt: But he said first it was the statement.

The Court: No, he did not say that.

Mr. Offutt: He said he saw the statement.

The Court: No, he did not.

Mr. Offutt: May I have it read?

The Court: Just a moment.

Mr. Offutt: I beg your pardon, sir.

The Court: Do not challenge the Court like that.

Mr. Offutt: No, I am not challenging the Court.

The Court: Well, now, don't use that tone.

He said that he saw what purported to be the statement of Mrs. Ott.

Mr. Offutt: Well, if your Honor please—

The Court: Now, you can proceed.

Mr. Offutt: I recall him saying that he saw the statement first.

Is your Honor saying that I am incorrect?

683 The Court: I am referring to what he said a moment ago in answer to your question.

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Q. Didn't you also refuse to talk to me about the
684 facts in this case? A. I refused to talk to you about my personal life.

Q. Didn't you refuse to tell me about the facts in this case? A. No, I did not.

Q. Did you ever tell me about the facts in this case? A. I asked you last night what did you want to know, and you asked me questions about my personal life, and I refused to answer them.

Q. On May 27, the same day that you saw Mr. Stein, didn't you see me, too, later? A. That is right.

Q. Alone? A. That is right.

Q. Didn't you then refuse to tell me anything about the facts in this case? A. Yes, and I told you it was because Mr. Stein was trying to get questions out of me about my personal life that I didn't feel were any of his business.

Q. You didn't tell me anything on May 27; is that right? A. No. That is right.

Q. Refused to talk to me in any way; is that right? A. That is right.

Q. Now, then, didn't you further say that Mr.
685 McLaughlin had told you not to talk to me? A. No, I did not say that. You put those words in my mouth.

Q. Didn't you say that Mr. McLaughlin told you not to talk to anybody about the facts in this case? A. I said, as I recall, that Mr. McLaughlin had said it was a good idea not to discuss this case. He didn't say with who, or without

Mr. McLaughlin: I object, your Honor.

The Court: I am going to sustain the objection.

Mr. McLaughlin: He is trying to testify.

The Court: The witness had a perfect right to refuse to discuss the matter with you, and that does not affect his credibility.

Mr. Offutt: That is right.

The Court: And therefore I will exclude that question.

Mr. Offutt: He had a perfect right to talk to me, too, didn't he, your Honor?

The Court: Yes. He had a choice, and whichever
686 choice he made has no bearing on his credibility as a witness, and therefore you may not interrogate him about it.

Mr. Offutt: Wasn't the jury got the right to consider this?

The Court: No, that does not go to his credibility and therefore I exclude it.

As a matter of fact, if he were wise, he would refuse to discuss the matter unnecessarily.

Mr. Offutt: I move for a mistrial on that statement, your Honor, because I have a duty to interrogate these witnesses, and it is perfectly right and proper, and I ask your Honor to instruct the jury at this time—

The Court: It was perfectly right and proper for you to endeavor to interview him.

Mr. Offutt: Yes, sir.

The Court: It was equally right and proper for him to refuse to submit to an interview, if he so chose; and therefore this matter has nothing to do with the issues of this case, because the only issue in this case is whether the defendant is guilty or innocent of the charges of which he is being tried.

Mr. Offutt: I ask your Honor to instruct the jury at this time that it is for him to make the decision, not the

District Attorney. He should not interfere with my
687 efforts to investigate this case, the District Attorney should not.

The Court: There is no evidence that the District Attorney has interfered with your efforts to investigate the matter, and your statement intimating to the contrary is not founded on anything in this record and is therefore improper.

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694 Q. And I am asking you why did you go back the second time, if you were opposed to it, to help arrange it? A. When I went back the second time, I was not trying to help arrange it. I was trying to convince her that she had an out, that is all, so that then with the mental strain off her, perhaps I could persuade her not to go through with it.

Q. That she had an out—how? What do you mean
695 by that? Explain that. A. That she had an alternative to having a baby.

Q. Did you ask her to have the baby? A. Yes, I did.

Q. Did you ask her in the presence of the doctor when you went back? A. No, I did not.

Q. Why didn't you, if you wanted her to have the baby?
A. I didn't think the doctor would try to convince her to have a baby.

Q. As a matter of fact, you did not try to convince her to have the baby at all; isn't that right? A. No, that is not true. I tried it all the time.

Q. Didn't you know that once before, from what she had—didn't she tell you that once before she was to have a baby and she tried her best to stop from having a baby? A. No.

Mr. McLaughlin: I object, your Honor. There is no such testimony.

The Court: Objection sustained.

Mr. McLaughlin: And I think my friend should be reprimanded.

I object, your Honor.

The Court: Objection sustained, while on cross-examination.

696 Mr. Offutt, I remind you of the fact that I have excluded that matter two or three times during this trial, and I don't want you to try to inject it again.

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710 Q. Don't you know whether she did or did not attempt to get a room in the Raleigh Hotel before you went to the Harrington? A. I am not sure. I think she called them.

Q. From where? A. I don't know.

Q. In your presence? A. No.

Q. Did you know about it then? I mean, by being present when she was making the call? A. I can tell you what I know about the Raleigh Hotel.

Q. I am asking you a question about the Raleigh Hotel, whether you know—

The Court: Just a moment.

Have you finished your answer?

Mr. Offutt: I object to it, unless—

The Court: Just a moment.

Have you finished your answer?

The Witness: No, I had not.

The Court: Finish your answer.

The Witness: I know that she called the doctor and told him she had a room in the Raleigh, because he had told her he would not perform it unless she had a room in a
711 hotel, and actually she did not have a room in the Raleigh at the time. As I recall, she may have called that hotel, trying to get a room, and was turned down, and decided to tell the doctor she had a room there, anyway, so that he would do it.

Mr. Offutt: Is that all your Honor wants to ask him?

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712 Q. Wasn't the abortion complete when you left the hotel? Hadn't it passed? A. Yes, it had.

Q. Didn't you say so yesterday? A. Yes, it had.

Q. And you were helping her when it was passed, weren't you? A. Well, that depends on what you mean by "helping".

Q. You were right there with her, weren't you? A. I was with her; yes.

Q. And you did what you could to assist her, didn't you? A. To comfort her; yes.

Q. You did nothing else to help her? A. Well, what could I do?

Q. I don't know. I am asking you. What did you do?

The Court: I suggest that the witness is entitled
713 to be treated with a little more courtesy.

Mr. McLaughlin: Sure.

Mr. Offutt: I think I can be firm with this witness, your Honor. He is in jail now.

The Court: This witness is entitled to the same courtesy as any other witness.

Mr. Offutt: That is right, your Honor, and I am entitled to get the answers, and I am not discourteous.

The Court: But you must ask your questions in a courteous manner and in a courteous tone.

Mr. Offutt: I say this is a courteous tone, your Honor.

The Court: You have a right to be firm.

Mr. Offutt: What is what I am trying to do.

The Court: And you have a right to be courteous, and the two are not inconsistent.

Mr. Offutt: I submit it is firm. It may not be the gentle thing.

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722 Q. Now, in December of last year, Mary Lee Ott came to the jail to see you and told you about her condition, didn't she? A. That is right.

Q. And didn't she tell you at that time that Jones was the father of this child, and she didn't want to marry him, didn't want the baby?

Mr. McLaughlin: I object to this, your Honor. It is immaterial. He is talking about the second abortion now.

Mr. Offutt: That is right.

The Court: Objection sustained.

By Mr. Offutt:

Q. That was before you had ever seen the police, wasn't it? A. Yes, it was.

723 Q. That you saw her, yes.

And didn't she tell you that she was living with William E. Jones, under the name of Ott?

Mr. McLaughlin: I object to that, your Honor.

The Court: Objection sustained. That is not proper cross-examination.

* * * * *

726 Redirect Examination

By Mr. McLaughlin:

Q. Mr. Offutt was asking you about the interviews he had with you and how you refused to tell him anything.

Did Mr. Offutt see you at the jail last night? A. Yesterday evening, about four—

* * * * *

Mr. Offutt: I object. That is beyond the cross-examination, and your Honor limited me, and I move that he be limited.

* * * * *

727 Q. What did Mr. Offutt say to you down there?

A. Well, he told me that—

Mr. Offutt (interposing): I object to the line,
728 your Honor.

The Court: Objection overruled.

Mr. Offutt: Can my objection run to—

The Court: Objection overruled.

Mr. Offutt: Now, if your Honor please, I object to your Honor signaling me down with your hand each time.

The Court: Well, you keep your seat or I will have the marshal make you resume your seat.

You may proceed.

Mr. Offutt: I move for a mistrial.

The Court: Proceed.

Mr. McLaughlin: Go ahead.

The Witness: He told me that he had a witness that he could bring up to testify of Mary Lee Ott's low moral character, and that he hesitated to do that, but in view of my testimony he would probably have to.

I became angry when he said that, and told him to get out of my sight and leave me, and then he said he would get me tomorrow.

And with that, he walked away.

By Mr. McLaughlin:

Q. Now, this Mr. Stein came down to see you. He is an associate of Mr. Offutt, is he? A. He had purported himself to be an associate of Mr. Offutt, yes.

755 Friday, June 6, 1952.

759

John L. Sullivan.

having been previously sworn, resumed the stand and testified further as follows:

760 Cross-Examination

By Mr. Offutt:

761 Q. Did you give him a copy of the search warrant?
A. I did.

Q. Did you give him a copy of the affidavit in support of the search warrant? A. I did.

The Court: Now, just a minute—

Mr. McLaughlin: This is immaterial.

762 The Court: This is all irrelevant, because all this must have been gone into on the motion to suppress.

Mr. Offutt: No, we did not use the detective at all. That was not gone into.

The Court: That doesn't make any difference; the motion to suppress was denied in part and granted in part.

Mr. McLaughlin: That's right, before Judge Keech.

Mr. Offutt: But the portion I am asking about now, your Honor considered yourself without hearing anything. It was not gone into.

The Court: Now, you must be more courteous to the Court, Mr. Offutt.

Mr. Offutt: I beg your pardon—I am courteous, your Honor.

The Court: I am going to exclude this, because all this was heard on the motion to suppress, and of course the motion to suppress was heard before another Judge, and you had a right to inquire into all these matters at that time. This motion having been determined, this matter becomes immaterial now.

Mr. Offutt: If your Honor please, may I approach the bench, so that you won't have me saying something out here which may be wrong?

The Court: No, I have made my ruling.

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764 Q. And when you went into the premises there, did not the doctor ask you, after you had told him you were there in connection with this matter, as you have stated, didn't he tell you, "I want to call a lawyer?" A. He told us—

The Court: You may answer.

The Witness: He told his brother, who came in shortly after I got there, to call you, Mr. Offutt.

By Mr. Offutt:

Q. That's right; and didn't you refuse to let the brother call me? A. No, sir.

Mr. McLaughlin: I object to it.

The Court: I think that is all irrelevant and I will exclude that.

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765 Q. Now, Mr. Sullivan, isn't it a fact that Dr. Peckham told you he wasn't answering any questions until you let him call his lawyer?

The Court: You may answer.

The Witness: No, sir.

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766 Q. Didn't Dr. Peckham ask his brother to call me, Dorsey K. Offutt, his lawyer, and you refused to let him use the phone; isn't that a fact? A. No, Mr. Offutt. He said to his brother, "Have you called Dorsey Offutt?" And his brother replied--at least this man I am speaking of, this man was identified to me by Dr. Peckham as his brother, and he said, "No, I have not." And Dr. Peckham's reply was, "Well, why don't you call him?" And with that he went out of the room from where we were, and whether he called you or not I don't know.

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770 By Mr. Offutt:

Q. While the four of you were in the basement, and while the three detectives were in the process of taking these things you have referred to, this man came down the steps, didn't he? A. Yes, sir.

Q. He came all the way down into the basement before anything was said, isn't that right? A. As far as I knew.

Q. I want your best recollection, as far as you know, that's all. A. I have given it to you.

Q. Didn't his brother, Dr. Peckham, ask him to call me first, that is Dorsey Offutt?

The Court: You have been over that twice; now you can't go over it the third time, and the witness has answered your question. He stated his recollection of what occurred.

Mr. Offutt: Your Honor, it is very difficult to examine the witness with your Honor interrupting me and Mr. McLaughlin both interrupting me.

The Court: I think you are very discourteous to the Court.

Mr. Offutt: I don't mean to be discourteous.

The Court: It is the Court's duty to interrupt
771 you, Mr. Offutt, if you are asking questions that are irrelevant or repetitious.

Mr. Offutt: I don't mean to be repetitious, your Honor—it's hard to cover—

The Court: You must not address the Court in that manner.

I am going to exclude that question as repetitious.

By Mr. Offutt:

Q. Did the brother go all the way up the steps, out of your sight? Did you see him go all the way up the steps, out of your sight, before you left that premise? A. As I recall, Mr. Offutt, as I have stated, sometime during this procedure, either just before we left or at the time we were getting ready to leave, the statement in reference to the brother was made by Dr. Peckham to his brother about calling you, and when he answered Dr. Peckham, he said, "No, I have not." It was some time during the seizure of these articles that were taken under the search warrant that this conversation took place.

Q. Didn't his brother, when he came down, say, "What's going on here? What are these men doing here?" A. Not to me, no.

Q. No, I am talking about in your presence. A.
772 I didn't hear it.

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783 Q. You were told to pick up a mixer there, weren't you? A. I wasn't told to pick up anything.

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785 Q. Didn't Mary Lee Utt tell you that the mixer that the doctor had was one he held in his hand and stirred?

The Court: I think that is beyond the scope of the direct examination, and I am excluding that.

Mr. Offutt: Yes, but I am asking it.

The Court: I have excluded it, Mr. Offutt.

786 Q. Did you take that mixer here in connection with the two cases that are being tried, on which Dr. Peckham is being tried today? A. I did, sir.

787 Q. You said you had your reason for taking it. The reason you had was—

Mr. McLaughlin: Now, I object to him telling the reason. If he wants the reason, let him ask it.

The Court: You may ask the witness what his reason was, if you wish, but you may not tell him.

Mr. Offutt: I am going to ask him the reason.

The Court: Well, you may ask him what the reason was, but you may not put words in his mouth.

Mr. Offutt: I am not going to put words in his mouth.

May I ask the question my own way?

The Court: You will have to ask the question in the proper way.

The proper way is to ask what his reason was, and not—you know very well that you can't ask it in the form in which you started.

Mr. Offutt: I thought I could ask him my own way, and then if it was wrong, your Honor could tell me.

The Court: No, because that gets before the jury matters which they should not know.

788 Mr. Offutt: Will your Honor permit me to ask it my way? I am sure it's right.

The Court: No, no. You may ask it in the proper way, or in the way the Court rules is proper.

Mr. Offutt: I am going to ask it in the proper way. Will you let me finish my question before you rule on it?

The Court: No. You will follow the direction of the Court, Mr. Offutt.

Mr. Offutt: Tell me what to do, and I will do what you say. You tell me what to do. Tell me what the question should be, and I will ask it.

The Court: Oh, no; I have ruled. You proceed, Mr. Offutt.

Mr. Offutt: All right, sir.

The Court: I have told you the way such a question should be asked, if you wish to ask it.

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789 Redirect Examination

By Mr. McLaughlin:

Q. All right, why did you take the motor?

Mr. Offutt: I object. I never asked one question about that.

The Court: Objection sustained.

Mr. McLaughlin: All right; if you don't want to know, that's all right.

Mr. Offutt: I object to the District Attorney continuing to talk after your Honor has ruled—I didn't hear it—may I hear what Mr. McLaughlin said?

The Court: The reporter may read it.

The Reporter (Reading):

"All right; if you don't want to know, that's all right."

Mr. Offutt: I move that your Honor admonish Mr. McLaughlin from talking—there is no call for it—after
790 your Honor has ruled and ruled against him.

The Court: The Court does not need any instructions from counsel how to conduct the trial.

Is there anything further?

Mr. McLaughlin: No, I have nothing further of this witness, your Honor.

The Court: You may step down.

(Witness excused.)

Mr. McLaughlin: Call Officer Waters.

Thereupon

Emmist R. Waters

was called as a witness by the United States and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. McLaughlin:

Q. Officer, your full name is what?

Mr. Offutt: May I just note an objection? I just noticed something here, so I will have it on the record, your Honor.

I object to Mary Lee Ott, who is under subpoena, being in the courtroom, in the same position that she occupies every day.

The Court: She has already testified and her testimony has been concluded, and witnesses who have already testified may remain in the room as a spectator.

Mr. McLaughlin: She hasn't been released from the subpoena for the Government.

The Court: Beg pardon?

Mr. McLaughlin: She hasn't been released from the subpoena of the Government.

The Court: After her testimony is concluded, she can sit any place she likes. Any witness who has testified may remain in the courtroom as a spectator, and the mere fact the witness may be called for rebuttal is no reason for the Court not permitting the witness to remain. We were over that yesterday, Mr. Offutt. Please don't repeat it.

Mr. Offutt: I object to the long speeches about it, your Honor; I just made an objection and I asked your Honor to rule on it, that's all.

The Court: You object to what?

Mr. Offutt: I object to—

The Court: You object to what?

Mr. Offutt: I object to the long dissertation about it. I made no argument; your Honor has not permitted me to make any argument, and I merely object to Mr. McLaughlin—

The Court: I think you are getting very discourteous to the Court.

Mr. McLaughlin: May I say for the record, your
792 Honor, in view of your Honor's ruling the other day in regard to the witness, that Mr. Offutt's attitude of raising the question at this time is just to attract the attention of the jury to Mrs. Ott; that's all. It is just for an ulterior motive.

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795 Cross Examination

By Mr. Offutt:

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810 Q. Did you ever have Mary Lee Ott confront the defendant?

The Court: I am going to exclude that, because that is beyond the scope of the direct examination.

By Mr. Offutt:

Q. Did you ever have Mary Lee Ott identify the defendant personally?

The Court: Now, I am going to exclude that also.

Now, my previous ruling applies to this. That is obvious.

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813 And the Government rests its case.

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856 OPENING STATEMENT ON BEHALF OF DEFENDANT

By

MR. DORSEY K. OFFUTT

• • • • •

865 Mr. Offutt:

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Your Honor, may I approach the bench? There is something I am not sure of your Honor's ruling on.

May I approach the bench, to be sure of it?

The Court: Yes, you may come to the bench.

• • • • •
866 Mr. Offutt: I don't want to say something that is contrary to your Honor's ruling.

I want to say that I can prove—and I can proffer it, if it is permitted, your Honor,—that when she was living at 3925 Georgia Avenue, Northwest, with Mr. Christenson, he was away, in June, and he went to Chicago, and in coming back he was picked up in Baltimore and arrested—well, anyway, he didn't come back.

Now, when he did not come back—I wanted to say, because I can show it by records, your Honor, now, if it is admissible, that he was arrested, he was charged with false pretenses, pleaded guilty, and placed on probation, and then—

The Court: No, that is not admissible, and you should know it.

Mr. McLaughlin: No.

Mr. Offutt: Let me explain it. Anyway, can I say this—the point is this: I want to show that he did not come back. She heard he could not come back right away, and she began living with a man named William E. Jones at that address, and then he came back and met William E. Jones, while they were living together, and they had an argument.

The Court: No, that is not admissible. It is immaterial.

Mr. McLaughlin: Her morals are not in question, your Honor.

867 The Court: I will exclude that.

Mr. Offutt: The purpose is—I was going to show that is the motive. They had a fuss, and he was over in jail, and she became pregnant by Jones, and he notified the

police, and that is when he went—they went to Mt. Alto Hospital because of his talk with the police about Jones and about his wife.

The Court: On that ground I am going to disallow it.

Mr. McLaughlin: Absolutely. I object to it.

Mr. Offutt: All right.

(Counsel returned to the trial table.)

Mr. Offutt: We will show you by the evidence and Mr. and Mrs. Ott moved from that address over to 3009 Q Street, and when she went over there, we will show you that she went over there and lived as husband and wife with William E. Jones, under the name of W. V. Ott.

Mr. McLaughlin: I will object to that your Honor. Your Honor ruled on that.

The Court: I ruled from the bench that I am going to disallow that.

That has nothing to do with the issues of this action, and let's proceed.

The mere fact that a witness is called to the witness stand and is not a party to the proceeding, does not allow her whole reputation to be smirched, or her whole life
868 laid bare.

Mr. McLaughlin: It is not a question of a moral issue, your Honor.

The Court: This is all irrelevant.

Mr. McLaughlin: Absolutely.

Mr. Offutt: That is not the purpose of it, your Honor. There was something else I was going to show that developed that.

Mr. McLaughlin: You ruled on that at the bench, your Honor, I thought.

The Court: I am going to exclude that.

Mr. Offutt: I did not understand that was your ruling at the bench, your Honor.

I want to show you from the evidence that when William E.—that when Mrs. Ott was living at that address, that she arranged with Mr. Jones to go to the hotel—I have for-

gotten now which hotel it was, but the evidence is here showing which hotel she went to, and was later joined by Mr. Jones—I believe it was the Raleigh, but we will show by the evidence one of those hotels, either the Raleigh or the Harrington—but I believe it will show it was the Raleigh.

We will show you that she went there after arranging with Mr. Jones to go there, and to attempt to have an abortion performed on herself, either by herself or by
869 Mr. Jones, or with both of them conspiring and combining and confederating together.

We will show you that something took place. Where it was—something took place, and they had trouble.

So then she, Mrs. Ott, called up her friend, Dr. Paul Bender, at Mr. Alto Hospital, and what they said we cannot prove that, but what we will show is that then, instead of Dr. Bender arranging to get her in the hospital, she then goes out to the hospital herself or called in some way and went into the hospital without any connection with Dr. Bender, and went into the hospital by Mr. Jones carrying her out there, leaving her right at the entrance, just inside the emergency entrance, not making his identity known, and she not making her identity known, and he leaving her and not contacting her in any way.

And then we will show you that when she went into that hospital, she made no statement to anybody about any effort to induce an abortion, because she was trying to defend and keep out of trouble Mr. Jones.

In the meantime, we will show you by the evidence that Christenson was over in jail, and he learned about Mrs. Ott being out in a hospital, and he learned about Mrs. Ott and Mr. Jones living together as man and wife.

Now, he didn't like that.

870 Mr. McLaughlin: I thought your Honor ruled on that at the bench, that that was immaterial.

The Court: Yes, I think that is absolutely irrelevant to the issues of this action.

Mr. Offutt: I wanted to show the motive.

All right.

I will show you that while Mrs. Ott was in the hospital, they interrogated her.

She said as to whether or not there had been any attempt to do anything to bring about an abortion, and she denied it right away when she first went in, except to admit that she tried to do something to herself to bring about an abortion. And one other thing she told them was that she tried to do it by the use of quinine, castor oil, and hot baths, to try to cause an abortion on herself.

We will show you that she got the information of how to do this from Mr. Jones, a pharmacist mate in connection with the dispensary—we will show you he is connected with the dispensary down at Quantico, and had access to the pharmacy and hospital things down there.

874

Paul M. Graff, Jr.

was called as a witness for and on behalf of the defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Offutt:

879

Monday, June 9, 1952

884

Q Well, before you took the stand in this case, had you ever talked to me?

Mr. McLaughlin: I object.

The Court: I am going to exclude that also. Now, proceed to bring out whatever testimony that is relevant and which you wish to elicit from this witness.

Q. Have you ever talked to me about the matter I am inquiring about, or anything, before you took the stand?

Mr. McLaughlin: I object to this, Your Honor.

The Court: Now, just a moment. I already excluded that question and you are repeating it.

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Mr. Offutt: If Your Honor please, I object to Your Honor—Your Honor appears to be provoked with me this morning.

The Court: I have been provoked with you all through the trial, Mr. Offutt.

Mr. Offutt: I mean this morning.

886 Mr. McLaughlin: May I say that his actions—

Mr. Offutt: I object to Your Honor moving your hand as you did just then, and gesticulating, and I want to put on the record those things.

The Court: Go back to the counsel table.

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Mr. Offutt: When I wanted to approach the bench before, I wanted to go to the toilet—when I asked to step out for two minutes—and you would not let me.

The Court: You could have stepped out without making a commotion while I was having a bench conference. I cannot be interrupted.

Mr. Offutt: I am sorry, Your Honor, but I wanted to go out to the toilet and I still want to go.

The Court: Do you want to go to the toilet now? You may go if you wish, and I will wait for you for five minutes.

Mr. Offutt: I am sorry I have to do that, Your Honor, but will you let me do that?

887 The Court: Well, go ahead.

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888 Q. Do you have with you the records of the District Jail of George A. Christenson? A. I do.

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890 Q. Did you make a telephone call to Mrs. Mary Lee Ott, the gist of which was that you asked Mary Lee—

Mr. McLaughlin (Interposing): I object, Your Honor.

The Court: No, no. You may not ask the question in that form.

By Mr. Offutt:

Q. Well, have you got the records with you in which are the telephone message requests which were made by
891 you, sir? A. I presume so. They should be in this jacket.

Q. Can you recall what the message was that you made—the last one—for Mr. Christenson to Mary Lee Ott? A. I cannot recall from memory, no, sir.

Q. Could you refresh your recollection from the telephone request? A. If I may, yes.

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892 Mr. Offutt: Very well, sir.

The Witness: On June 3 I received a request from George Christenson to call Mrs. Ott, Adams 9317.

Question: "Did your mother come to town?"

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893 The Court: You may proceed with your answer, Mr. Witness.

The Witness: "Did your mother come to town? How did things go? Were they hard on you?"

The reply I received to that message was:

"Mother is in town. Tried to put me in a bad light, but not too successful. Will see you as soon as this is all over."

By Mr. Offutt:

Q. Is that the message George Christenson asked to be sent to Mary Lee Ott? A. That is correct.

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895 Q. Did Mr. Christenson talk to you about this message that he had asked you to send? A. He did.

Q. Before you sent it? A. Before I sent it.

The Court: The witness has already testified that he telephoned this message to Mrs. Ott at Christenson's request. Now, don't go back over that same ground with him.

By Mr. Offutt:

Q. Now, the message which you have read, that Mr. Christenson asked you to transmit to Mrs. Ott, and the portion which you have read as the message which Mrs. Ott had you transmit to Mr. Christenson, does that include all of the conversation between you and Mrs. Ott? A. No, I don't believe it does.

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896 Q. Did you in any of the conversations with Mrs. Ott, that you told Mr. Christenson about, tell Mr. Christenson about any of the testimony that Mrs. Ott said she had given in court in this trial? A. As I recall, I did.

Q. Can you tell us what that testimony was that you told—what Mrs. Ott told you the testimony was, and what it was you told to Mr. Christenson?

The Court: Suppose you limit yourself to telling us what you told Christenson.

Mr. Offutt: May I have the whole thing, Your Honor?

897 The Court: What is that?

Mr. Offutt: May I not have the whole conversation?

The Court: Conversation between Mrs. Ott and this witness is inadmissible, but those portions of that conversation which this witness transmitted to Christenson would be admissible.

Mr. Offutt: May I object to that limitation, Your Honor? I submit the whole conversation is admissible.

The Court: Objection overruled.

The Witness: I told Christenson, as nearly as I recall, that Mrs. Ott said they had never, to her recollection, told anyone that they were married. He said he presumed that the landlord understood that.

I believe that is all that was said, that I recall definitely.

899 Q. Didn't Mrs. Ott tell you to tell Mr. Ott that I, Mr. Offutt, was trying to prove a conspiracy between them? A. I have no definite recollection of that.

Q. Was there anything in substance like that that you can recall? A. Not that I recall.

Q. Was my name mentioned at all? A. I could
900 not be certain. I am not certain.

It comes to me now that there was some mention of conspiracy. I am not certain, but there is some recollection of it.

The Court: Now, I am going to exclude anything that Mrs. Ott said to this witness, as I have said before. You may examine this witness concerning anything that this witness transmitted to the witness Christenson.

Mr. Offutt: All right.

905 Q. Would you mind, Mr. Graff, looking at May 21, 1952, and see if there is a telephone message or request of that date? A. There is one here.

Q. Is there anything in that message in relation to this case or anyone connected with the case, the District
906 Attorney or anybody? A. Yes, there is a reference there.

Q. And would you tell us what the message was, relating to this case? Just read that, please. A. It is addressed to Mrs. Ott—

The Court: Speak a little louder. Speak louder so all the jurors can hear you.

The Witness: Yes. (Reading):

"My father is being buried in California. Nancy will be back Friday night and plans to come over here Saturday. You had better call Bill at home tonight and make arrangements to come over with them on Saturday. Is it definite that we are going to see McLaughlin Saturday morning?"

"Message delivered to wife, Mrs. Ott."

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907 Q. Is there one there that appears to be May 15 or 16? A. May 15 or 16.

Q. To Mrs. Ott? A. Yes.

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Q. Can you tell us what the message was that he has requested in this case? A. (Reading):

908 "I got in touch with Nancy and she will not be coming over this week-end"—

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Q. Well, in that message was there a request in the message that you ask that—that Mr. Christenson asked
909 that Mrs. Ott come over alone on Saturday?

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The Witness: It was the suggestion that she come over Saturday.

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Q. As a result of that call, was there any response as to whether or not the parties would call or contact Mr. McLaughlin? If so, what was it? A. (Reading):

"Will call McLaughlin at 4 o'clock."

Q. Who would call Mr. McLaughlin at 4 o'clock? A. The person to whom the call was directed, presumably.

Mr. McLaughlin: Who was the call directed to?

The Witness: Mrs. Ott.

The Court: I do not see the materiality of this.

910 Mr. McLaughlin: No, Your Honor.

Mr. Offutt: If Your Honor please, it is a conflict with the witness Christenson, and his testimony in this case.

The Court: Well, that is not admissible and you may not contradict him on a collateral matter.

Mr. McLaughlin: No. I do not see where it contradicts him, either.

He testified exactly what is in there, and read those notes.

The Court: I don't see any conflict with this witness' testimony.

Mr. Offutt: I can show it to you in the record, Your Honor. I have it here.

The Court: There may be deviations in slight details, which is natural between any two human beings, but I don't see any real conflict.

Mr. McLaughlin: When he recalled Christenson on the stand, he read those same notes.

The Court: Yes. You are going over the same ground. You read the very same notes.

Mr. McLaughlin: He read the very same notes.

Mr. Offutt: Your Honor, I was limited when I got to that, and I was limited to one time after the trial started, if I am not incorrect. I thought Your Honor limited me to those messages after the trial had started, and I am
911 offering it to show the getting together of these persons by contact.

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917 Q. On February 7, 1952—and I will have to get this exhibit back so he can look at it, Your Honor—wasn't there a telephone message request to Mrs. Ott which message was delivered, to this effect, "Tell her"—

Mr. McLaughlin: I object.

The Court: No, I am going to let him ask the question. Go ahead, proceed.

918 By Mr. Offutt:

Q. (Continuing) "Tell her that she has been granted permission for a special purpose visit tomorrow morning, Saturday, at 10 a.m. Ask her if an indictment was returned today and, if so, on how many counts," and "Wasn't there a message to that one." "Don't know."

The Court: Just a moment. I shall not have you read the answer to that. I am going to exclude this as immaterial.

Mr. McLaughlin: Absolutely. This whole line is immaterial, if Your Honor please.

The Court: There is no conflict in these messages. It is just a waste of time.

Mr. Offutt: Will you let me read the last portion?

"Will be"—

The Court: No, you will not read any further.

By Mr. Offutt:

Q. Didn't you on February 7, 1952, as a result of a telephone message—don't state the message—from Mr. Christenson to Mrs. Ott, tell Mr. Christenson that Mrs. Ott would be out at the jail to see him about this case?

The Court: Now, don't you understand my ruling that I have excluded that?

Mr. Offutt: All right.

The Court: Don't you dare repeat questions in a different form after I have excluded them.

919 Mr. Offutt: If Your Honor please, I am sorry to have to object to this, but I object to you raising your voice and shaking your hand at me in the presence of the jury.

The Court: Yes, I am going to shake my finger at you some more if you do not behave yourself.

Mr. Offutt: Now, I submit I have a right to make this objection, Your Honor, and I am not doing anything to—

The Court: You must behave yourself.

Mr. Offutt: I object to Your Honor raising your voice and saying it, when I have done nothing to warrant that.

Mr. McLaughlin: That is a matter of opinion.

The Court: You have not conducted yourself properly, in my opinion, and you have not done it throughout this trial.

Mr. Offutt: I object to that, Your Honor.

Mr. McLaughlin: I am going to renew my objection, Your Honor, to this line of questioning.

The Court: I am going to sustain the objection.

Mr. Offutt: Very well.

May I know the number of the exhibit the Clerk marked?

The Deputy Clerk: Defendant's 5 for identification.

Mr. Offutt: May I see the paper he marked for identification, Your Honor, which was taken from the witness Graff?

The Court: Yes, you may.

(The exhibit, Defendant's No. 5, was handed to Mr. Offutt.)

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928

Blanche Dobkin

was called as a witness for and on behalf of the defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Offutt:

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Q. During that time, in 1951 I am referring to now, did you have anyone occupying part of the premises by
929 the name of George A. Christenson? A. No.

Q. Did you have anyone occupying part of the space by the name of Christ Rhones, C-h-r-i-s-t and the last name is R-h-o-n-e-s? A. No.

Q. Did you have anybody occupying part of the premises at that time under the name of Mr. and Mrs. William Ott? A. Yes.

The Court: I think all that is immaterial.

Mr. McLaughlin: Absolutely. We don't deny that. She testified to all that, that she was living there.

The Court: I am going to exclude that. That has all been testified to.

Mr. McLaughlin: Yes.

The Court: And you don't have to corroborate it.

Mr. Offutt: I think the testimony was he did not hold himself out to be—

The Court: I don't care whether he held himself out to be husband and wife, or not. It is immaterial to the issues in this case. I shall exclude this testimony.

Mr. Offutt: Your Honor, can I have the person by the name of Ott identified, the Mister Ott?

The Court: No, that is immaterial.

Mr. Offutt: I would show that the Mister Ott was William E. Jones, who is out here.

930 The Court: No, it is immaterial to the issues of this case.

You know, as I have said before, there is only one issue in this case and that is whether the defendant is guilty or not guilty of the crimes charged in the indictment.

Mr. Offutt: Yes, sir.

The Court: All this is side issue that has nothing to do with this case, and I have already excluded it.

Mr. Offutt: May I have an objection to that, Your Honor and then proceed?

The Court: Yes, you may have an objection to it, and the objection is overruled.

Mr. Offutt: May I ask the next question to get the dates?

By Mr. Offutt:

O. Will you tell us the dates that the defendant's—I have to get the name, first, in order to get the dates, Your Honor. I want to show the dates—

The Court: I am excluding this line of inquiry.

Mr. Offutt: May I have an exception to that, Your Honor?

The Court: The witness may be excused.

Mr. Offutt: Thank you.

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933

David I. Gale

was called as a witness for and on behalf of the defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Offutt:

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Q. Are you employed by the District of Columbia Parole Board? A. I am.

Q. And what is your position there, sir? A. I am
934 Secretary to the Board.

Q. And pursuant to a subpoena to produce certain records here, have you appeared here with those records, the records of George Aaron Christenson? A. I have those records.

Q. May I see them, sir?

The Court: Well, just a moment.

Are those records confidential records?

The Witness: They are not marked "Confidential," Your Honor.

The Court: Are the files of the Parole Board confidential?

The Witness: Yes, they are, Your Honor.

The Court: I shall not permit disclosure of Parole Board files.

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Q. Those records which you have there, are they
935 kept in the regular course of business?

The Court: No, I am going to rule that records of the Parole Board, just like the records of the Probation Office, are confidential and are not subject to disclosure. And they are records kept in the due course of business. You need not labor that point, but they are the type of records that are kept confidential, and I might explain why:

Because, when a person is on parole or on probation we try to give him a chance to rehabilitate himself, and one of the ways we do that is not to permit a disclosure, or an unnecessary disclosure of any files concerning him.

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Q. Are those records kept in the regular course of business over there?

936 The Court: I am going to exclude that. I have already told you that I will make a finding that these are kept in the due course of business.

Mr. Offutt: Oh, I see.

May I ask the one—I think I have it sufficiently now to approach the bench, Your Honor.

The Court: Yes, you may come to the bench and make a proffer as to what you propose to prove by this witness.

(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice, as follows:)

Mr. Offutt: If Your Honor please, in connection with the Parole Board records, I expect to show, if I were permitted to do so—and this is not based upon my personal knowledge, of course, not having seen the Parole Board records, but I have very good information from a very reliable source that the records would show that George A. Christenson is not on parole here in the District of Columbia; that an application was made—that he is eligible for parole at or about this time, and that in connection with the information they obtained from the Parole Board, or they obtained, there was a letter addressed to Mrs. Mary Lee Ott. In that letter she was asked about the status of her husband, and whom she refers to as a common law husband, and he had

referred to her in his statement to the Parole Board that she was his wife, common law wife.

937 At that time it was found that he was already married, and so then there was some correspondence which will show that they have endeavored to locate the marriage, and proceedings were undertaken by him to obtain a divorce from the wife that is still living. Thereafter—

The Court: I am going to exclude all that as obviously irrelevant.

Mr. McLaughlin: It is immaterial.

The Court: I am going to say on the record that counsel should know it is irrelevant.

Mr. Offutt: May I continue my proffer, Your Honor, of what it would show so the record will be complete, in case we have to go to the Court of Appeals?

The Court: I am going to take it part by part. I have excluded so much of what you have already stated. Now you may continue with your proffer.

Mr. Offutt: Yes.

The Court: But make it very brief and succinct. I am not going to let you talk for a half hour making a proffer.

Mr. Offutt: I assure Your Honor I won't do that.

The Court: Proceed.

Mr. Offutt: Now, if the Court please, it will show that a letter was addressed to her asking her if she was the common law wife—

The Court: No, you have said that once before.
938 Do not repeat it.

Mr. Offutt: And asked her if she would remain true to him, and that was one of the bases and reasons for which they would grant a parole; if he has a wife, that is one of the things they would consider, and that she misrepresented to them that she would remain true to him, because at the very time she answered that letter, I will show by the date of it, she was living with another man, holding herself out to be the wife of the other man, at 3009 Q Street. The other man was George—William E. Jones, and he was living at 3009 - Q Street, and she held herself out to be his wife and she also held herself out to be the wife

of William E. Jones as W. V. Ott, at 3935 Georgia Avenue, during the same period.

At this time I will show by these records that she so did it, and it is a misrepresentation and fraud perpetrated on the Parole Board.

The Court: I am going to exclude all that as irrelevant.

Mr. McLaughlin: Irrelevant and immaterial, Your Honor.

The Court: And immaterial. I will say also that counsel should know that this is irrelevant and immaterial, as well as incompetent.

It is nothing but an attempt to besmirch unnecessarily and to subject to adverse publicity persons who testified as witnesses in this Court. I consider that attempt unethical.

Mr. Offutt: The basis was to show fraud.

939 The Court: No, you have finished with your proffer. You may go back to the trial table.

Mr. Offutt: May I tell Your Honor, please, that credibility is what we base it on?

The Court: Counsel is charged with the knowledge of the rules of evidence, and on matters of that kind the cross-examining counsel is bound by the answers of the witness given on cross-examination, and may not contradict the witness on a matter being purely collateral.

Mr. Offutt: Would Your Honor look at a case I have on this?

The Court: I think I know some Hornbook law.

Mr. Offutt: I don't mean that, Your Honor. I just tender—

The Court: What is that?

Mr. Offutt: I am just asking Your Honor if you would look at the case I have.

The Court: You may go back to the counsel table.

Mr. Offutt: Yes, sir. If the Court please, I must again object to Your Honor making gestures and manners up here. Your Honor very clearly shows some—

The Court: You have been very discourteous to the Court throughout this trial, and you have forfeited the right to that courteous treatment which this Court extends to all members of the Bar.

940 Mr. Offutt: I have never been discourteous, Your Honor.

The Court: Yes you have.

Mr. Offutt: I want the record to show that I claim Your Honor has gestured and you raised your voice from time to time, and right now Your Honor is raising your voice, and I object to it.

Mr. McLaughlin: Your Honor is not raising his voice at this time.

Mr. Offutt: When I say Your Honor is raising his voice, and I have people out here in the court here telling me they can hear what Your Honor says, and I have the names of some of them.

The Court: I have to say things in open court sometimes.

Mr. Offutt: But I object to it. I object to your raising your hands.

Mr. McLaughlin: May I say that the defendant's attorney, Mr. Offutt, has started out right from the beginning of this case to be arrogant and obstinate with Your Honor, and he has set out and planned and schemed for the purpose of trying to bait Your Honor into committing error in the case, and that has been his attitude throughout the entire case.

The Court: Yes, and I shall deal with the matter at the end of the trial.

Go back.

Mr. Offutt: If Your Honor please, I move right
941 now for a mistrial, and I say that right now the jury can hear everything you say. They are leaning forward, you can see them, and I want the record to show it, and that is improper, Your Honor, and I move for a mistrial and I say to Your Honor I object to Your Honor and the District Attorney, he has raised his voice too—right now.

The Court: Go back to counsel table.

Mr. Offutt: And I object, Your Honor.

The Court: Go back to the counsel table or I will have the Marshall put you there.

Mr. Offutt: I object.

(Counsel returned to the trial table.)

The Court: I am going to rule out the testimony that proposed to elicit from the witness Gale, as immaterial and irrelevant, as having nothing to do with the issues of this case.

You must not forget or lose sight of the fact that there is only one issue in this case, and that is whether this defendant committed the two abortions with which he is charged in the indictment.

Mr. Offutt: If Your Honor please, may I tender this and Your Honor refuse to admit it?

The Court: You may not tender them. I will not permit a disclosure of the parole records and, moreover, I have indicated that the proffer you made at the bench
942 leads to the conclusion that the matters concerning which you want to interrogate this witness are irrelevant, immaterial, and incompetent.

• • • • •
943 **William Edward Jones, Jr..**

was called as a witness for and on behalf of the defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Offutt:

• • • • •
945 Q. Did you know of any address where Mrs. Ott lived after 3935 Georgia Avenue, Northwest? A.
Do you mean where she is living now?

Q. Yes, sir, do you know that address?

The Court: I do not see the materiality of that question, and I shall exclude it.

Mr. McLaughlin: No, Your Honor, it is not material.

946 By Mr. Offutt:

Q. Were you present when she moved from 3935 Georgia Avenue to 3009 Q Street, Northwest, when Mrs. Mary Lee Ott moved to that address?

Mr. McLaughlin: I object to this as immaterial, Your Honor.

The Court: Objection sustained.

By Mr. Offutt:

Q. Did you actually move her things from that address 3935 Georgia Avenue?

Mr. McLaughlin: I object to that as immaterial, Your Honor.

The Court: Objection sustained.

Mr. Offutt: If the Court please, I have some other questions I want to ask of this witness, but in view of the Court's statement about the witness Christenson, I feel that this gentleman should be advised of his rights by the Court before I ask certain questions.

The Court: Well, first you ask the questions.

Mr. Offutt: All right.

By Mr. Offutt:

Q. Now, Mr. Jones, did Mrs. Ott hold herself out to be your wife and did you hold yourself out to be her husband to the landlady, Mrs. Steerman, at 3009 - Q Street, Northwest, when she moved into that house?

947 Mr. McLaughlin: I object to this, Your Honor, as immaterial.

The Court: Objection sustained. This is absolutely irrelevant and immaterial, and I made the same ruling just a short while ago today in connection with another witness, Mr. Offutt.

Mr. Offutt: Oh—

The Court: Please do not repeat the same type of questions after they have already been ruled out.

This has nothing to do with the defendant's guilt or innocence.

Mr. Offutt: May I object to that ruling, Your Honor?

The Court: Yes.

By Mr. Offutt:

Q. Now, Mr. Jones, on January 18, 1952 were you in the Raleigh Hotel with Mrs. Mary Lee Ott, the lady I have

indicated back here, before she went to Mount Alto Hospital?

Now, don't answer that until the Court has a chance to advise you.

I submit, Your Honor, this witness—

The Court: First you ask the question and now—

Mr. Offutt (Interposing): —should be advised of his constitutional rights, so that he might not incriminate himself.

The Court: The witness may answer the question.

Mr. Offutt: All right.

948 The Court: You may answer the question.

Mr. Offutt: I submit he should be told—

The Court: Beg pardon?

Mr. Offutt (Continuing): —whether he is required to answer it under his rights.

The Court: No. Now, the Court will perform its own functions with at any suggestions from counsel.

Mr. Offutt: I am not suggesting, Your Honor.

Mr. McLaughlin: Sure. If my friend had called Mr. Jones as a witness, I am sure he advised him of his rights.

Mr. Offutt: I might say, Your Honor, he asked me if he had to answer these questions and he said—

The Court: He may answer the question.

Do you understand the question?

The Witness: Yes, sir.

The Court: Or do you want to have it read to you?

The Witness: No, sir, I understand it.

The Court: What is that?

The Witness: I understand it.

The Court: You may answer the question.

Mr. Offutt: May I just withdraw that question for a moment?

The Court: Well, are you withdrawing the question?

Mr. Offutt: I am withdrawing the question at this time, Your Honor.

949 The Court: Very well.

By Mr. Offutt:

Q. Mr. Jones, before you took the stand, did you ask me whether you had to answer these questions relating to this matter—

Mr. McLaughlin: Your Honor, I—

The Court: I am going to exclude all that. I am going to exclude any conversation between you and the witness.

Mr. Offutt: All right.

Mr. McLaughlin: Trying to impeach his own witness, Your Honor.

The Court: You know that is not relevant.

Mr. Offutt: All right.

Now, answer the question.

The Court: Oh, no, you have withdrawn the question.

Mr. Offutt: I am going to re-ask it now. I thought the witness should be told, and I did not tell him before.

The Court: Well, then, you will have to ask your question.

Mr. Offutt: That is what I am going to do, Your Honor.

• • • • •
966 Cross-Examination

By Mr. McLaughlin:

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967 Q. Now, when you first went in the hotel, what was Mary Ott's condition? A. She was very sick, sir.

• • • • •
Q. Now, did you yourself do anything, that is, insert any instruments in her body, of any kind, to bring on that sickness?

Mr. Offutt: Just a minute. Your Honor, I think he should be advised of his rights, and be protected.

The Court: Just a moment. Don't you repeat that remark. I told you before that counsel has no right to say that.

• • • • •

972 Redirect Examination

By Mr. Offutt:

Q. Now, when you were first seen by—oh, strike that.

Did you say you have never talked to Mr. McLaughlin?
Is that your statement? A. No, I have never talked with him.

Q. Didn't you talk to him out here today before you came in here—this gentleman (indicating)? A. Today?

The Court: Now, just a moment.

Mr. McLaughlin: Let him answer it, Your Honor.

The Court: That was not the question that Mr. McLaughlin asked. Mr. McLaughlin asked, "Did you ever see me before this case started?"

Mr. Offutt: Oh.

Mr. McLaughlin: That is right. I don't mind him asking him about today.

Mr. Offutt: All right, never mind. Let it go.

The Court: I think you ought to be careful in stating what occurred.

973 By Mr. Offutt:

Q. Did you ever see me before this case? A. No, sir.

Q. Did I ever ask you anything about the effects of what you did up in that room?

The Court: No, I am going to exclude that, because he is your witness.

Mr. Offutt: That is right.

The Court: You have called him and therefore you may not ask him a question of that sort now.

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977 Mr. Offutt: If Your Honor please, I want to claim surprise at this time, and come to the bench.

978 The Court: I know of no basis for your claiming surprise.

Mr. Offutt: Well, I want to tell you the basis. I will tell you the basis at the bench. I would like to do it at the bench. I want to claim surprise.

The Court: Don't use such a belligerent tone, Mr. Offutt.

Mr. Offutt: Your Honor is characterizing my statement.

The Court: You may come to the bench.

(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice, as follows:)

Mr. Offutt: If Your Honor please, this witness has surprised me because he said he would not talk to me about the facts in the case; he would not discuss anything, whether anything happened up in that room with respect to what her condition was, or what happened, and he said he wanted to ask the Court about it—wanted me to ask the Court, and I said, "Well, I cannot do it; I would rather have you do it than have me do it, since you are asking me that way," and there was some Lieutenant here who said he was in the Navy, and said he thought this man should be advised of his rights.

If the Court please, for that reason, he said he was not going to talk about it at all, I am surprised, because I was led to believe, and my information is very, very excellent on this—I have excellent information that this man did

979 tell her to use this quinine and he told her to use the other, the castor oil and hot baths, and some-

thing else, and I was told, Your Honor, by a person—an informant—that this woman Mary Lee Ott went to the Hotel Statler Pharmacy and obtained a catheter there and some medicine, ergot, or something of that character, from the druggist at the Statler—now, you know these druggists, they just don't want to talk to you about these things,—and this man is supposed to have told her what to get, and a further thing is, Your Honor, my information was that he had gotten a catheter himself and ergot down there at Quantico, and he refused to talk to me at all, and I am surprised here at the stand that he testifies, because that is what he said he wasn't going to do.

The Court: There is no basis for surprise. The ordinary basis for surprise is a situation where a witness tells

a story different from that which he told counsel he would tell.

980

Dr. Bernard M. Tully

was called as a witness for and on behalf of the defendant and, having been first duly sworn, was examined and testified as follows:

993 Cross-Examination

By Mr. McLaughlin:

Q. Doctor, in regards to those records of May 6, do the records show whether he was confined to his bed all that day? A. On the 6th, sir?

Q. Yes, May 6, 1951. A. Ordinarily a patient is not allowed off the floor on which he is roomed.

Q. He being a doctor— A. And in order to go from one floor to another, he has to have permission from one of the doctors, and it has to be put in the record so the nurse knows it.

Q. Being a doctor, wouldn't they give him certain privileges at the hospital? A. No, sir.

Q. You mean he could not come and go as he felt like? A. Now, you are asking questions that I cannot answer.

Q. You cannot tell? A. I know that doctors, as patients, are not treated any differently. They have to know where he is at all times.

Q. And during the time—of course, you don't know his condition at that time, do you, Doctor, on May 6? A. I was not acquainted with the patient until I was

994 told to bring the records down.

Q. But on May 7 you do not know whether he was confined to the hospital the entire day, do you?

In other words, you did not know whether he was up and around, walking around, or anything, did you? A. My personal knowledge is nil. The record shows that he has not been dismissed from the hospital; had not been given permission to leave the hospital.

Q. That is what I say. The records do not indicate whether or not he was or was not in the hospital. In other words, he had not been given permission to leave? A. Well, if he had left the hospital, it would be in the record, if it were found out.

Q. And say he left the hospital for a couple of hours, would that happen? A. It is possible.

Mr. McLaughlin: That is all.

Redirect Examination

By Mr. Offutt:

Q. And would those records reflect any nurses' notes, or any recordings of the observations of persons who saw him in the hospital at various times during his hospitalization there? A. Yes, sir, they do.

995 Q. Are the nurses' notes in there, sir? A. Yes, sir, they are.

Q. Would you refer to these notes, sir, and tell us if there is any notations in there of the nurses' notes on Sunday, May 6, 1951? A. At 5 o'clock the patient was admitted to the admitting office.

5:30, the patient was noted to be on the floor, and the note read here that "Patient is ambulatory and admitted to room 6017. Patient in no acute distress. Dr. Stein notified."

At 9 p. m. the patient had a prep for operation and enema.

At 10 p. m. the patient had various medications, and was put to bed.

That is signed by the nurse that was on duty at that time.

Q. Now, is there any recording there of the next day—

A. At 6:30 a. m. in the morning, the patient was given his pre-operative medications, and at 8:15 the patient went to surgery.

Q. You mentioned something about—that is 8:15 a. m.?

A. That is right, sir.

Q. Now, you mentioned something about prepped
996 the day before, on the 6th, when you were talking

about it. Do they leave him with his street clothes when he comes into the hospital? A. No, the patient is undressed and his clothes are in the same room with him, but—

(The witness hesitated briefly.)

I cannot say what time the physical examination was done, but the examination is usually done between the time the patient is admitted and before the prep is done.

Q. During the night, between the time he was put to bed and the next morning, that you mentioned, 6 o'clock, does the nurse or someone come in the room from time to time to look at the patient, to see if he is still there and in good condition? A. Yes, they do.

Q. Are there any recordings made in connection with that? A. There is no recording made between 10 p. m. and 6:30.

Q. Now, then, beginning, you said—you said something about the operation at 8:30 a. m. was scheduled. Does it show when the operation was performed, and— A. The patient left for the operating room at 8:15 a. m., and returned at 11:15 a. m.

997 Q. Does it show whether the patient went under a general anesthetic or local anesthetic? If so, will you tell us what it reflects about that, and tell us the operative procedure? A. The operation was removal of protruded intervertebral disc between the L-2 and L-3, which is the lower part of the back, and anesthesia used was pentathol and nitrous oxide, and another type which is C-10.

Q. Would you keep your voice up a little bit, please? A. The anesthetist was Dr. Salard.

Do you want me to read the whole operative notes, sir?

Q. Well, can I ask you this: What is that operative procedure, from your knowledge of it?

Can you tell us from looking in the notes there what it is? A. Yes, sir. An incision is made over the lower portion of the back, of approximately—

The Court: What is the relevancy of the details of the operation? I do not see it.

Mr. Offutt: In view of the question that the witness was asked by Mr. McLaughlin, I want to show the condition of this patient, to see whether in the physical condition he would be in, after that type of operation, if he would be able to leave that hospital, as he inferred from the 998 question he asked, for an hour or two, on the 7th.

The Court: I don't think the details of the operation are helpful.

Mr. Offutt: Well, I submit, your Honor, the jury could have it and overcome the inference by the questioning of Mr. McLaughlin which was for that purpose.

The Court: None of us are experts. The jury are not experts, and the Court is not an expert.

Mr. Offutt: Oh.

The Court: And we cannot tell by hearing the medical details of an operation as to what the consequences of the operation might be.

By Mr. Offutt:

Q. Is that a minor or major operation? A. That is a major procedure and the patient is not allowed out of bed for approximately five or six days.

Q. And what size incision do they make in the back to perform that operation? A. Did you say size, sir?

Q. Yes. A. The incision is approximately five to six inches long.

The Court: I said the details of the operation are irrelevant.

999 Mr. Offutt: That is all I am going to do, your Honor, just that.

The Court: Well, time and again you try to ignore my ruling and get around it. I don't approve of that Mr. Offutt.

Mr. Offutt: I did not mean to do that, your Honor.

The Court: Well, then, don't do it.

Mr. Offutt: I thought you meant the minute details.

The Court: Proceed to your next question.

By Mr. Offutt:

Q. Dr. Tully, in the physical condition of the patient after an operation of that kind, could he leave the hospital and be gone for a couple of hours in that condition without the hospital knowing it? A. On what date is that, sir?

Q. On the date of May 7th, that is the date I am talking about. A. No, sir.

Q. After undergoing the operative procedure which you have seen there—and you may examine your hospital records to answer this question, if you need to do so, sir—would there be any operative residual or sequela which would, as relating to, first, let's take the effects of the pentathol, the anesthesia that was used, following the operation.

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1003

Elton E. Ernst

was called as a witness for and on behalf of the defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Offutt:

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1004 Q. Are you a member of the Metropolitan Police Department, sir? A. I am, sir. I am a detective assigned to the sex squad.

• • • • •

1015 Q. During the time that Mrs. Ott was talking on the telephone that you listened in on part of the conversation, did you know at that time that a subpoena
1016 had been issued out of this Court directing Mrs. Charles Hodges to appear here and testify in this Court?

Mr. McLaughlin: I object to this, your Honor. It is immaterial.

The Court: Objection sustained.

By Mr. Offutt:

Q. Did you have that subpoena before you in the sex squad room?

Mr. McLaughlin: I object to this, your Honor.

The Court: I have already sustained the objection. Do not pursue the same line of inquiry. I just sustained an objection to the question.

By Mr. Offutt:

Q. Were any threats made to that witness by me on the telephone, in the conversation that you heard that night?

A. No threats; no, sir.

Q. Was any inquiry made by me as to why this witness was calling me up at my home and disturbing me at that time of night, in your hearing, on that telephone conversation?

Mr. McLaughlin: I object to all this line of questioning, your Honor.

I cannot see the materiality of it.

The Court: Objection sustained.

By Mr. Offutt:

1017 Q. Did you ever talk to Mr. McLaughlin before you testified on the stand today, with respect to that telephone conversation?

The Court: I am going to exclude that as irrelevant. You called this witness as your witness.

Mr. McLaughlin: It is immaterial; yes.

Mr. Offutt: That is what I am trying to find out, though, your Honor.

The Court: You know that is not admissible.

Mr. Offutt: I do not know that, your Honor. I submit I have a right to go into it.

Mr. McLaughlin: I object to it.

By Mr. Offutt:

Q. Did you ever make a written memorandum about this matter at all?

Mr. McLaughlin: I object to that, your Honor. The whole subject is immaterial.

The Court: Objection sustained.

By Mr. Offutt:

Q. Did you ever make a written statement about it?

Mr. McLaughlin: I object to that.

The Court: Objection sustained.

Mr. Offutt: If your Honor please, I ask at this time if there is a statement by this witness, that I be permitted to see it, as I have in other situations, under the power of that subpoena that I issued.

The Court: No. I do not see any relevancy of the matter.

Mr. Offutt: All right, sir.

By Mr. Offutt:

Q. Did you ever get clearance from anybody before you allowed Mrs. Ott to use the telephone over there, to attempt to make that telephone call and talk with—

Mr. McLaughlin: I object to that, your Honor.

The Court: You asked that question once before, Mr. Offutt, and I excluded it.

Mr. Offutt: I was just reminded that I had.

The Court: Well, the responsibility is yours. You asked that question once before.

Mr. Offutt: Well, I am sorry. My attention was called to the fact that I had overlooked it, and I thought I had.

The Court: Well, you do that too often, Mr. Offutt; repeat the same question that has been ruled out.

Mr. Offutt: My associate just called my attention to the fact that I asked—she thought I asked—that I asked if he asked Mr. McLaughlin, and as I remember it, that is what I did ask.

Now, I want to know if he asked anybody for the clearance.

• • • • •

1020 Q. Now, Lieutenant Ernst, did you hear the witness Mary Lee Ott say in that conversation that the telephone she was calling from was Republic 5551?

Mr. McLaughlin: I object to that.

The Court: Objection sustained.

Mr. Offutt: May I finish the question?

The Court: No, you had finished your question. Objection sustained.

By Mr. Offutt:

Q. Did you ever answer that telephone when it was—was there a ring back on Republic 5551, and did you say it was the Casino Royal in answering that phone?

Mr. McLaughlin: I object to that, your Honor.

The Court: Objection sustained.

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1022 Mr. Offutt: If your Honor please, I would like to call the witness Mrs. Mary Lee Ott.

The Court: Very well.

Mr. Offutt: May the record show that she is in the courtroom, and coming to the bench, at my request?

The Court: The record may show no such thing, because you have no right to make a statement of that kind, and the witness may come forward.

Mr. Offutt: I want to show the fact that she is in the courtroom right now.

1023 The Court: The fact is irrelevant and therefore the record may not show it. You must not make any such statement as that.

Thereupon

Mary Lee Ott

was called as a witness for and on behalf of the defendant and, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Offutt:

Q. Mrs. Ott, were you served with a subpoena to appear as a witness in behalf of the defendant in this case?

The Court: I am going to exclude that as immaterial. She is here. You may examine her.

Mr. McLaughlin: Yes.

Mr. Offutt: I just want to show—

The Court: No, you may not show that you subpoenaed her.

By Mr. Offutt:

Q. Mrs. Ott, did you have any objection to Mr. McLaughlin looking at the hospital records in your case?

The Court: Just a moment.

Mr. McLaughlin: That draws the conclusion, your Honor, that I looked at them.

1024 The Court: We do not know whether Mr. McLaughlin looked at them or not.

Mr. McLaughlin: No, I never looked at any records at all in my life.

By Mr. Offutt:

Q. Do you have any objection to Mr. McLaughlin looking at the hospital records in your case?

Mr. McLaughlin: I object to this, your Honor.

The Court: Do not answer that question. That question is irrelevant and incompetent.

Mr. McLaughlin: And improper.

The Court: I will exclude it.

By Mr. Offutt:

Q. When Dr. Kilpatrick was testifying about your hospitalization in Mt. Alto Hospital, from January 18, 1952, to and including February 17, 1952, were you in the courtroom and hearing him testify? A. I believe you know if I was in the courtroom, and I certainly was.

Mr. McLaughlin: I object to this, your Honor. It is immaterial.

The Court: Well, she may answer that question.

By Mr. Offutt:

Q. Did you have any objection to him testifying
1025 about your hospital period and the treatment he gave you during that entire time?

Mr. McLaughlin: I object to this, your Honor.

The Court: Objection sustained.

You have no right to ask that question of this witness.

You must realize this: This witness is not a party to this proceeding. She is only a witness. She is entitled to have any communication she made to her physician kept confidential, and that includes hospital records, and the mere fact that a doctor was testifying to the diagnosis is not a waiver by this witness of her privilege, and you have no right to call her and ask her that question.

By Mr. Offutt:

Q. Well, when you testified about your hospitalization in the Naval Medical Hospital, in the psychiatric ward—

The Court: She testified because I directed her to answer. That is a very unfair question.

Mr. McLaughlin: How low can this fellow get?

Mr. Offutt: Your Honor, that is not the point.

The Court: The point is, she did not waive any of her rights by answering the question. You asked the question. She was reluctant to answer it. I said that you were entitled to ask the question, and directed her to answer.

That is not a voluntary answer on her part.

1026 Mr. Offutt: Now, if your Honor please, I object to your raising your voice at me and shaking your hand in that fashion, and appearing to reprimand me.

The Court: Well, you have to behave yourself in accordance with proper professional ethics.

Mr. Offutt: I submit that is proper, and there is no justification for your Honor to raise your voice and gesture in that way, and reprimand me in front of the jury.

The Court: I will do it even more severely,—

Mr. Offutt: And I move for a mistrial, your Honor.

The Court: (Continuing) —when you are using your improper practices.

Mr. Offutt: I move for a mistrial, and I say it is perfectly proper for me to ask questions that I think are proper.

The Court: Motion denied.

I am not going to have this witness or any other witness badgered the way you have been badgering witnesses.

Mr. Offutt: I object to that and move that that is not in accordance with the record, your Honor, and I submit I have not badgered this witness, and I have a right to ask if she is claiming privilege. Your Honor said she did, and she has a right to privilege.

The Court: She does not have to claim privilege.

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1038

Hubert Gulon Holton

was called as a witness for and on behalf of the defendant and, having been first duly sworn, was examined and testified as follows:

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1039 By Mr. Offutt:

Q. What is your rating, sir? A. Chief hospital corps man, United States Navy.

Q. Attached to the Naval Medical Center, in Bethesda, Maryland? A. U. S. Naval Hospital, Naval Medical Center, Bethesda, Maryland.

Q. Do you have here, pursuant to a subpoena served on the hospital officials, where you are attached, the records of Mrs. Mary Lee Ott, and her hospitalization in the Naval Hospital there? A. I have the records of one Mary Millicent Ott, I believe.

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1041 The Court: What period do the records cover?

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1042 The Witness: The first entry in this record is the 19th of December, 1947.

The last one is 9-13-1959.

The Court: Obviously his records are irrelevant, because they antedate anything that happened in this case.

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By Mr. Offutt:

Q Do you have the subpoena there which was served upon them? A Yes, sir.

• • • • •

1043 The Court: You may show him a copy.

(A copy of the subpoena was exhibited to Mr. Offutt by the witness.)

By Mr. Offutt:

Q This directs you to bring with you all medical records pertaining to Mrs. Mary M. Ott or Mary Lee Ott, relative to birth of child Gloria, in 1950, and any other medical records of Mrs. Mary M. Ott or Mary Lee Ott.

Now, Mr. Holton, would you examine those records and see if you have the records in that file relating to any psychiatric treatment in Ward—

Will your Honor indulge me?

The Court: I am going to exclude the question.

Mr. McLaughlin: I object to it.

Mr. Offutt: I object to that word "stupid question." I move your Honor to declare a mistrial with reference to the statement of a stupid question.

The Court: I am not characterizing the question, 1044 but I am sustaining the objection to it.

Mr. Offutt: But you called it a stupid question, the question that I make, your Honor, and I assure you I was trying to recall, and it was Ward K that the witness Ott—

and I was trying to identify specifically, and I move for a mistrial.

The Court: I am sustaining the objection to the question on the ground that it is irrelevant, immaterial and incompetent.

Mr. Offutt: And I am objecting to your Honor's characterization of my question to the witness as a stupid question. It is a very clear reference, your Honor.

The Court: Just a moment.

Mr. McLaughlin: Your Honor has already ruled on this.

The Court: Just a moment. I have not characterized your question.

Mr. Offutt: Maybe I misunderstood you. I thought you said "stupid question."

The Court: If I said that—no.

Mr. Offutt: You did not say that?

The Court: No. I said I am not characterizing your question.

You must have been dreaming, Mr. Offutt.

Mr. Offutt: I misunderstood you, I am sure.

1045 The Court: The word "stupid" is not in my vocabulary.

Mr. Offutt: I am sorry, your Honor. I beg your pardon, then.

The Court: Well, this is not the first false accusation you have made against the Court, Mr. Offutt.

Mr. Offutt: Now, I did not make any accusation. I understood, your Honor, that that is what you said. If you did not, your Honor, I want to apologize, very much. It sounded like it. The acoustics here are a little bad, and when your Honor—sometimes we both talk quickly, and it was an occasion that I called your Honor's attention—

The Court: I think you should observe proper decorum and proper demeanor and use appropriate language in addressing the Court.

Mr. Offutt: May I have it read, what your Honor said, if the Reporter got it?

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By Mr. Offutt:

Q. Mr. Holton, do you have in those records anything relating to the confinement in a psychiatric ward in 1046 1950 for several months?

Mr. McLaughlin: I object to this, if your Honor please.

The Court: Objection sustained. I have already excluded that.

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1052 Mr. Offutt: There was one further thing, your
Honor: I wanted to proffer something else that I
1053 would proffer by those records.

Shall I withhold that proffer until a little later on, when I can do so at the bench?

The Court: Very well.

Mr. Offutt: All right, sir.

Thank you.

Shall I tell the officer that he can leave any time he wants to?

The Court: I have excused the witness.

Mr. Offutt: Yes, sir.

Call Lieutenant Fred Donahower, please.

Thereupon

Fred Donahower

was called as a witness for and on behalf of the defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Offutt:

Q. Your name is Fred Donahower, D-o-n-a-h-o-w-e-r? A. That is correct.

The Court: Speak louder, so all the jurors can hear you.

By Mr. Offutt:

Q. I believe that you are a Lieutenant in the United States Air Corps, are you not, sir? A. That is 1054 correct.

And, Mr. Donahower, where do you live here in Washington, D. C.? A. I am at 2118 O Street.

Q. Is that Northwest Washington? A. Northwest.

Q. And is that an apartment house, or do you have any designation of the address? A. Well, it is a rooming house.

Q. Is there any number by which your particular quarters are designated at that address? A. Sir?

Q. Is there any number to the particular portion of the premises that you reside in at that address? A. Well, I have one of the rooms there.

Q. Is it numbered? A. I believe so. 3.

Q. Is it 3-B on the third floor back? A. That is correct.

Q. That is part of what they call Wesley Hall, isn't it, sir? A. That is correct.

Q. Now, Lieutenant Donahower, do you know the witness in this case, Mrs. Mary Millicent Ott, or Mary 1055 Lee Ott? A. I do.

Mr. Offutt: May the record show I have indicated the witness in this case, Mrs. Ott?

By Mr. Offutt:

Q. Now, Lieutenant Donahower, before appearing here today as a witness in this case, do you recall where you first saw me, and the date, sir? Fix the time and place. A. Where I first saw you?

Q. Yes, sir. A. I don't recall the date, but the place was the Officers' Service Club.

Q. And is that 21st and R Streets, Northwest? A. That is correct.

Q. What time of day or evening was that? Do you recall, sir, approximately? A. Approximately 11 p. m.

Q. Was there anyone with you at that time; do you remember, sir? A. Yes, sir.

Q. Directing your attention to the gentleman over here with the glasses, do you recognize him, inside the railing (indicating)?

Mr. McLaughlin: Tell him to stand up.

Mr. Offutt: Will you stand up, Mr. Stein?

1056 (The person indicated stood.)

By Mr. Offutt:

Q. Do you recognize this gentleman? A. Yes, sir.

Q. Did you talk with me on that occasion, sir? A. I did, sir.

Q. Where did you talk with me, what part of the premises, sir? A. I believe it was in the upper foyer and a small lounge off the foyer.

Q. Where had you seen me before you talked to me at that portion of the premises? A. Well, I had seen you downstairs, I believe, sir.

Q. Do you know the manager there, Mr. Permatto? A. Not personally.

Q. Do you know him by sight? A. I know who he is, yes, sir.

Q. Had you seen him with either Mr. Stein or myself down in the lower part of the premises? A. No, sir.

Q. Before you came up? A. No, sir.

Q. Now, do you know General Parker's wife?

Mr. McLaughlin: I object to this, if your Honor please.

1057 The Court: Objection sustained to this.

If you have anything to bring out by this witness, get to the point.

Mr. Offutt: That was the last question, your Honor, so this is right to the gist of it.

The Court: Very well.

By Mr. Offutt:

Q. Now, Lieutenant Danahower, when you talked with me at that time, did you discuss with me any facts or anything with relation to this case? A. There were no facts discussed about the case.

Q. With respect to any statement from you, or discussion, what did you say? A. I told you I didn't care to—

The Court: Just a moment.

Mr. Laughlin: Let him go. Let him go, your Honor.

The Court: What this witness said is not competent.

Mr. Offutt: What did I say?

By Mr. Offutt:

Q. What was the conversation? A. As far as I recall, sir, you introduced yourself to me and asked me—told me you would like to ask some questions of me, and I told you

I didn't care to answer any questions.

1058 Q. And did I introduce—do you remember the name I gave you, sir? A. Yes, sir.

Q. What was the name? A. You introduced yourself as Mr. Offutt.

Q. Now, after that had happened, what did you do? A. I believe we talked a short time and you wanted me to answer some questions about a Mrs. Ott, and I told you I did not care to answer any questions about anybody.

Q. Did you stay at the same place where I was then, or did you leave? A. I left then.

Q. Have you ever talked to Mr. McLaughlin, this gentleman sitting here (indicating)? A. Only briefly, to say hello.

Mr. Offutt: I think that is all.

May I ask one more thing, your Honor?

The Court: You have something else?

Mr. Offutt: May I ask this witness one more thing?

The Court: Yes, you may ask another question.

Mr. Offutt: All right, sir.

By Mr. Offutt:

Q. When was the last time you saw the lady here, if you have seen her—no, when is the last time you
1059 saw Mrs. Ott, Mrs. Mary Lee Ott?

Mr. McLaughlin: I object to this, your Honor.

The Court: Objection sustained.

By Mr. Offutt:

Q. Have you talked with her—strike that.

After you went away, following that conversation with me on that evening at the Officers Service Club, did you talk to Mrs. Ott about that conversation? A. I mentioned it; yes, sir.

Mr. Offutt: I think that is all.

Cross-Examination

By Mr. McLaughlin:

Q. In this conversation Mr. Offutt was asking you to say something detrimental about Mrs. Ott, was he not?

Mr. Offutt: I object to that. That is assuming a fact to be not a fact, and I object to the manner in which he is asking the question, his attitude.

The Court: Suppose you reframe the question.

By Mr. McLaughlin:

Q. In other words, during the conversation, when Mr. Offutt followed you out of the room upstairs to the mezzanine, he asked you what you knew about Mrs. Ott; isn't that right? A. Substantially; yes, sir.

1060 Q. And then when you told him that you did not know anything about the lady, he said, "Well, I am going to subpoena you in Court out of spite," did he not?

Mr. Offutt: I object to that, your Honor.

Mr. McLaughlin: Isn't that a fact?

Mr. Offutt: That assumes a fact—

The Court: Objection overruled.

Mr. Offutt: I object to him gesturing to the witness like that, your Honor.

Mr. McLaughlin: I don't see what is funny about it, my friend.

The Court: You may answer the question.

The Witness: Would you please repeat the question?

The Court: Suppose you read the question, Mr. Reporter?

(The pending question, as above recorded, was read by the Reporter.)

The Witness: The words "in spite" were not used.

By Mr. McLaughlin:

Q. What words were used? A. He said, as far as I recall, that if I did not care to answer his questions there, he would subpoena me.

Mr. McLaughlin: That is all.

The Court: You may step down.

Do you have any questions?

1061 Mr. Offutt: Yes.

Redirect Examination

By Mr. Offutt:

Q. Were there any threats of any kind made to you, sir?

A. There were no threats, no.

The Court: You may step down. You may be excused.

Mr. Offutt: He has to go back to the service, your Honor.

The Court: He may be excused.

Mr. McLaughlin: May I ask him one more question?

The Court: Yes.

By Mr. McLaughlin:

Q. You had a difficult job getting rid of Mr. Offutt, didn't you?

Mr. Offutt: I object to that.

Mr. McLaughlin: All right, let him answer it.

Mr. Offutt: If your Honor please, I object to him—

The Court: Well, I overrule the objection.

Mr. McLaughlin: Will you answer that?

The Witness: You might say so.

The Court: You may be excused.

(The witness left the stand.)

The Court: I want to say this, gentlemen: It was
1062 an imposition on this witness, and an imposition on

this Court, for the defendant to subpoena and call this witness for the purpose for which he was called. It is a waste of the Court's time.

Mr. McLaughlin: He had been down here two days, too, your Honor.

Mr. Offutt: I object to that and move for a mistrial. I have a right to interrogate witnesses and get an answer, whether they know any of the facts or not. It is my duty.

The Court: But it is irrelevant. You did not ask a relevant question of this witness.

Mr. Offutt: But there are some things I had information on, your Honor, that he might have known about, and I had a right to investigate and interrogate him about it.

Mr. McLaughlin: It is an abuse of trial procedure.

The Court: Yes, a trial is no place for--

Mr. Offutt: I move for a mistrial. Would your Honor act on that?

The Court: I am going to deny this motion for a mistrial, as I have denied twenty or thirty others in this case.

We will recess until ten--

Mr. Offutt (interposing): There was one thing your Honor deferred, so I could look at the statement, and this young man from down in Quantico.

1063 The Court: Yes.

Mr. Offutt: Does your Honor wish me to wait until tomorrow?

The Court: We will take our recess at this time.

Do you wish to bring something up?

Mr. McLaughlin: No, your Honor.

The Court: Ladies and gentlemen of the jury, we will recess this trial until 10 o'clock tomorrow morning. You will be excused at this time, and please be back in your seats a few minutes before 10 o'clock tomorrow morning.

(Whereupon, at 3:40 o'clock p.m., an adjournment was taken until tomorrow, Tuesday, June 10, 1952, at 10 o'clock a. m.)

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1068 Mr. Offutt: Yes, sir. If the Court please, I respectfully move Your Honor to declare a mistrial, Your Honor, for these reasons.

Your Honor has characterized me by gestures, by intonations of voice, by leaning forward in your chair, waving your hand at me, and time and time again I have tried to get these things in the record when they occurred but Your Honor has refused to let me come to the bench and refused to let me make a proffer in open court when I have tendered it.

I have read the cases of Bilecci and Lewis, and they hold that I am entitled to do that, and I am required to do it and that's the reason I have tried to do it when the occasion arises, and Your Honor has prevented me from doing it. And, if Your Honor please, you have created an impression of prejudice with your accusations—

The Court: Now, just a moment.

Mr. Offutt (Interposing): I have the record right here.

The Court: Just a moment. I will not permit you to argue.

Mr. Offutt: I am not arguing; I want to state the basis for my objection and my proffer.

The Court: You have already stated it.

Mr. Offutt: I want to proffer these things which the Court of Appeals has said I have to do, in the Bilecci
1069 case and in the Lewis case.

The Court: The motion is denied; the motion is on the record and is denied.

Mr. Offutt: If Your Honor please—

The Court: I might say this for the purpose of the record, that I have rebuked counsel and I have rebuked counsel severely, and I have indicated by my tone of voice on occasion that I disapproved of counsel's conduct—

Mr. Offutt: If Your Honor please—excuse me—

The Court (Continuing): —counsel brought it upon himself by his unethical conduct during this trial, and by his contumacious conduct.

Mr. Offutt: What was the conduct? I have asked for it, what was the conduct?

The Court: You may not ask for a bill of particulars.

Mr. Offutt: I make a proffer at this time and I want to make a proffer, as the Court of Appeals has said I have to do, that Your Honor—

The Court: We haven't time for that. I have let you protect your rights by making your objection.

Mr. Offutt: The Court of Appeals, in the Lewis case, says that I must do it.

The Court: You may go back to counsel table, gentlemen.

Mr. Offutt: May I call your attention to something in the record? Your Honor said you couldn't use the 1070 word "stupid" yesterday and I have the record here.

The Court: Mrs. MacReynolds, have you got yesterday's record?

The Reporter: No, sir, Your Honor; it will be over in just a few minutes.

Mr. Offutt: No, I said you said it once before.

The Court: Oh, yes, I did, but I didn't say it yesterday when you accused me of saying it.

Mr. Offutt: That's the way I understood it.

The Court: No, I did not. What I said was this—I think perhaps you don't pay close attention. I don't think the trouble is with your hearing, but I think you don't pay close attention. I said that I excluded that, and you thought I said "That is stupid."

Mr. Offutt: Your Honor, I thought you did; Your Honor, I fully understood it.

The Court: Anyway, you may go back to counsel table.

Mr. Offutt: May I call your attention—

The Court: No, you may not.

Mr. Offutt: If this witness I asked you about, and I want to ask about a statement you made—

The Court: You may not ask me questions. You go back to counsel table and proceed with the trial.

Mr. Offutt: May I have an objection to this?

The Court: You may.

1072 Mr. Offutt: * * *

If Your Honor please, I have the transcript of proceedings of Monday, May 26, before Chief Judge Laws, and I would like to—I state to the Court that Judge Laws ordered me to—

The Court: No, you may make no statement.

Mr. Offutt: Very well. Can I ask counsel if he will make the stipulation? Otherwise I will have to get Judge Laws as a witness.

I move Your Honor at this time and I make a proffer of proof.

The Court: Are you offering that transcript in evidence? You may make it in the form of an offer of that transcript and I will rule on it.

Mr. Offutt: May I see the proceedings, if it is in there, Your Honor, May 26, 1952, Monday, before Judge Laws? May I see if it is in the record?

The Court: What is it you want?

Mr. Offutt: I want to see the original transcript of the court record of May 26, 1952.

The Court: I have it here; what do you want with it?

Mr. Offutt: I want to make an offer of it, if I can see it.

The Court: Of May 26? I have no transcript of
1073 May 26. May 27th was the first day of the trial.

Mr. Offutt: Do you have any other transcript here, Mr. Clerk?

The Court: Do you have a copy of that transcript?

Mr. Offutt: Yes, sir, I have it; it was filed in the proceedings.

The Court: You may offer the copy with the same force and effect as though it were the original.

Mr. Offutt: All right, Your Honor. I offer only that portion that relates to the subpoena of the witness.

The Court: Don't read it.

Mr. Offutt: I beg your pardon, sir?

The Court: Don't read it. Show it to Mr. McLaughlin.

Mr. Offutt: And I offer with it the notice of taking the deposition.

1074 The Court: The Court will take judicial notice of its own file.

Mr. Offutt: But I wanted to get the time of it; I don't have it.

The Court: The Court will take judicial notice of everything that is in the file. The file is before the Court.

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Mr. Offutt: Your Honor, this was a hearing before Judge Laws—

The Court: No.

Mr. Offutt (Interposing): And I am offering that.

The Court: No. I have made my statement and I invite no response to it.

Mr. McLaughlin: We object to it.

The Court: If you wish to offer anything in evidence you may do so.

1075 Mr. Offutt: May I make an objection to Your Honor's statement, please?

On page 2 of that transcript of proceedings—

The Court: The Court will take judicial notice of the transcripts of anything in this case. You may show that to the Court, if you will, because I haven't got a copy of it.

Mr. Offutt: Oh, all right. It is page 2, and also—

The Court: I notice it is very short. Hand it to the Clerk and I will read all of it. Hand it to the Clerk.

Mr. Offutt: All right, Your Honor.

The Court: Hand it to the Clerk.

Mr. Offutt: I want to refer to page 4, Your Honor—I object to Your Honor raising your voice and shouting in that way you just did.

The Court: You are getting insolent again.

Mr. McLaughlin: If Your Honor please, may I state for the record that your Honor asked him for the transcript and he deliberately withheld it from Your Honor.

The Court: Your conduct is contumacious.

Mr. Offutt: I respectfully move for a mistrial, Your Honor, on the basis that Your Honor's attitude and conduct is prejudicial.

The Court: I think what you are trying to do throughout this trial is to create an episode which will cause a mistrial, and this is something I shall not permit, because that 1076 is not in the interest of justice.

Mr. Offutt: I assure Your Honor that is not true. I have to make this proffer in accordance with the cases.

(The transcript was handed to the Court.)

The Court: There is nothing relevant in this transcript to any proceeding in this case.

You may proceed to call your witness.

Mr. Offutt: May I have an objection to Your Honor's refusal and the offer in evidence?

The Court: Excluded.

Mr. Offutt: If Your Honor please, I respectfully move at this time, in accordance with the Bilecci case, that Your Honor correct the impression which must be present here in the jury, from the attitude of Your Honor, and from your gestures and intonations of voice and your remarks, and state to the jury that I have a right to object.

The Court: Motion denied. You may proceed.

Mr. Offutt: If the Court please, may I recall Mr. Jones at this time, and since I have just gotten the statement back again, and resume my examination?

The Court: You may call any witness you wish.

Mr. Offutt: All right, Mr. Jones, please.

May the record show he has been sitting in the courtroom during this time, and is coming from a seat in the courtroom.

Mr. McLaughlin: Your Honor, this is the defense
 1077 witness. He called him. He didn't ask him to be
 excused; he didn't dismiss him. He is under sub-
 poena to him.

The Court: I understood you had concluded your exami-
 nation.

Mr. McLaughlin: Absolutely.

The Court: And in accordance with our usual practice,
 we have witnesses who have testified sit in the courtroom,
 instead of in the witness room, for reasons which you no
 doubt understand.

Mr. Offutt: Just in line with my objection, Your Honor, I
 want the record to show he was in the courtroom.

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William Edward Jones, Jr.,

called as a witness by the defendant, having been previ-
 ously sworn, resumed the stand and testified further as fol-
 lows:

Direct Examination

By Mr. Offutt:

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1078 The Court: You may come to the bench.

(Thereupon, counsel approached the bench and conferred
 with the Court, in a low tone of voice, as follows:)

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Mr. Offutt: If Your Honor please, I want to ask this
 witness about some things in his statement, which I have
 just learned by seeing it, that were not covered in the direct
 examination, except to this extent, when he referred to the
 fact that, as I recall it, that he had known her for several
 years.

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Mr. Offutt: I want to ask him if it is a fact that he went
 around with this lady, Mrs. Mary Lee Ott, when he was

out at the Bethesda Hospital, in 1950, in March and April,
and at least once or twice a week while she was living
1079 with the man in her common law marriage, named
Christ, who is Mr. Christenson, and that—

The Court: I shall exclude that.

Mr. McLaughlin: I object to that, Your Honor.

The Court: Just a moment.

Mr. Offutt: I thought you were going to let me finish.

The Court: I thought you had finished that one question.

Mr. Offutt: I was going to include these other things in
the same question.

Mr. McLaughlin: I think he ought to ask all the questions
down there.

The Court: I am going to exclude that question as
obviously irrelevant, and I also wish to add, for the purpose
of the record, that is nothing but an attempt to smear and
throw mud at the witnesses in this case, without any justi-
fication, and in an irrelevant matter.

Of course, if an issue is relevant, and results in mud being
thrown, that is permissible, but to throw mud at a person
on an absolutely irrelevant matter, merely because he is a
witness, is not permissible.

Mr. Offutt: I respectfully urge that the credibility of the
witness Ott is very much in issue.

The Court: In the first place, he is your witness, and in
the second place, even if he were an adverse witness, the
cross-examination as to credibility may not extend that far.

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1080 Mr. Offutt: May I make the proffer at this time?

The Court: No, you may not.

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Mr. Offutt: That is the reason I objected to Mr.
1081 McLaughlin several times, Your Honor.

The Court: Now, you take care of your own con-
duct and Mr. McLaughlin will take care of his. I think if

your conduct were as good as Mr. McLaughlin's I would give you a medal.

Mr. Offutt: I object to it because when I have objected to it, I have to object to it, and I am able to show you many places in the record where Mr. McLaughlin has continued talking, and I have objected to it.

The Court: The next time when I make a ruling I don't want any response from you.

Mr. Offutt: I beg your pardon.

Mr. McLaughlin: Let's have the questions asked from down at the counsel table.

The Court: You may go back to counsel table and proceed with the examination of the witness.

Mr. Offutt: May I have an objection?

The Court: Go back to counsel table.

Mr. McLaughlin: May I say that the defense attorney—

The Court: Go back to counsel table.

Mr. Offutt: I object to your putting your hand up like that—

The Court: Go back to counsel table. Stop, or I will have the Marshal pull you back to your seat.

Mr. McLaughlin: May I say for the record that this attorney has abused Your Honor's privilege of asking 1082 to come to the bench.

(Thereupon, counsel resumed their places at the trial table and the following proceedings were had in open court:)

Mr. Offutt: If the Court please, I respectfully move Your Honor for a mistrial and—

The Court: Motion denied.

Mr. Offutt (Continuing): —and I want to put the proffer on the record at this time—

The Court: Motion denied.

Mr. Offutt: And I want the record to show that Your Honor raised your hand—

The Court: Motion denied.

Mr. Offutt (Continuing) —and ordered me back from the bench.

The Court: Motion denied. Proceed.

Mr. Offutt: I object to Your Honor yelling at me and raising your voice like that.

The Court: Just a moment. If you say another word I will have the Marshal stick a gag in your mouth.

You proceed with the examination of the witness. Proceed.

Mr. Offutt: If Your Honor please, I can't continue like this—

The Court: I direct you to continue.

Mr. Offutt (Continuing): —with Your Honor yelling at me and Your Honor is threatening me with punishment for contempt for objecting, as I have a right to do, in accordance with the Lewis case.

The Court: You may proceed.

Mr. Offutt: I insist on being permitted to object and make my motions when Your Honor's conduct justifies it.

The Court: You have made your motion and I have ruled, and you will desist from speaking after I have ruled on your motion.

Mr. Offutt: But then you did something—

The Court: Proceed with the examination of this witness.

Mr. Offutt: Has this been marked for identification? Will you mark this for identification?

The Court: You may mark it.

(Thereupon, the document referred to was marked Defendant's Exhibit No. 10 for identification.)

By Mr. Offutt:

Q. When did you make this statement, do you know, Mr. Jones?

The Court: Just a moment. I am going to exclude that.

Mr. McLaughlin: I object to this, if Your Honor please.

The Court: You have called this witness as a defense witness—

Mr. Offutt: That's right, Your Honor.

The Court: I am excluding that.

1084 I explained at the bench yesterday the limits on the use of this statement.

• • • • •
1091 Q. What was the occasion of seeing her those several times? Was there any discussion about this pregnancy, and if so, what was it—Mary Lee Ott? A. I knew that she was—she told me she was pregnant, and that's about as far as it went.

• • • • •
1092 By Mr. Offutt:

Q. What was said? Give us the conversation. A. She wanted to go to this Dr. Peckham and have an abortion.

Q. Did she use Dr. Peckham's name at that time?

The Court: No, just a minute.

Have you finished your answer—don't interrupt the witness.

Mr. Offutt: I thought he had.

The Court: Have you finished your answer?

The Witness: Yes.

Mr. Offutt: I object to being interrupted like that, Your Honor.

The Court: I don't think you should use such a menacing manner toward the witness; the witness is entitled to courteous treatment.

Mr. Offutt: I object, Your Honor, and I respectfully submit it is not menacing, in the first place.

The Court: It seemed so to the Court.

Mr. Offutt: If Your Honor please, I object to Your Honor interrupting me like this; it diverts my attention.

The Court: The Court will protect every witness against discourteous treatment by any counsel.

Mr. Offutt: I submit that is not discourteous; there is nothing I have done except the proper manner of a lawyer in examining a witness.

1093 The Court: Now the Court doesn't invite any replies to its comments.

You may proceed.

Mr. Offutt: May I have the question? Would you read the question?

The Court: You may have the question read.

Mr. Offutt: I will withdraw the question and reframe it.

The Court: You may have the question read.

Mr. Offutt: I will withdraw it and reframe it.

By Mr. Offutt:

Q. Did Mrs. Ott use Dr. Peckham's name when you talked to her before the first of the year? A Yes.

Q. She did? And of course you told the police that when you made the statement to them; right?

Mr. McLaughlin: If Your Honor please, he is arguing with his own witness.

Mr. Offutt: I am not arguing with him.

The Court: Objection sustained.

By Mr. Offutt:

Q. Didn't you tell the police that, when you gave the statement?

The Court: I sustained the objection. You have called him as your witness.

1094 Mr. McLaughlin: It is his own witness; you have been over that and you are bound by what he says.

Mr. Offutt: If Your Honor please, I am asking him a question, did you tell that to the police, and that is the statement I want to ask him about.

The Court: I am sustaining the objection to that because this witness was called by you. He is your witness and you may not cross-examine him.

By Mr. Offutt:

Q. Mr. Jones, back in—when you gave this statement, this matter was fresher in your mind then than it is now, wasn't it? A. That's right.

Q. And have you talked to Mrs. Ott here since you were on the stand yesterday?

Mr. McLaughlin: I object to this.

The Court: Objection sustained, for the same reason; this witness is your witness.

By Mr. Offutt:

Q. Did you leave the courthouse with her yesterday after you testified?

Mr. McLaughlin: I object to that.

The Court: I have excluded that line of inquiry; you may not prove that.

Mr. Offutt: I intend to prove, Your Honor, that 1095 they were sitting together—

The Court: No, no, I will not let you do that in open court. You may proceed.

Mr. Offutt: May I come to the bench and make a tender of proof?

The Court: No, you may not. Proceed.

Mr. Offutt: May I make a tender here?

The Court: Proceed with the examination of this witness, if you have any further questions to ask.

Mr. Offutt: If the Court please, I move at this time that you instruct the jury that I have a right to make these objections, and that it is my duty to do so, so that they won't get the wrong impression, Your Honor.

Mr. McLaughlin: I say that is true when they are proper, but when they are frivolous and for the purpose of deceiving the Court, they are not.

Mr. Offutt: If Your Honor please—

The Court: Now, I have ruled—

Mr. Offutt (Interposing): I have a right to make any objection, Your Honor, that I think is proper, and the Court passes on it, and that is my duty.

The Court: Yes, but you must do so in the realm of propriety.

Mr. Offutt: That's right, Your Honor, and the Court of Appeals says that I must tell you at the time, and
1096 that's what I am doing now.

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1106 The Court: Was anything else said between you and Mrs. Ott concerning an abortion, in addition to what you have already told us?

The Witness: The only thing, the fee was \$150, if I remember correctly—that's all there was.

By Mr. Offutt:

Q. You said there was something that occurred that caused you to change your mind. What was that that occurred—tell us what you did after you had changed your mind.

Mr. McLaughlin: I object.

The Court: Now, you have asked three or four
1107 questions. Suppose you select what question you want to ask the witness.

Mr. Offutt: All right.

By Mr. Offutt:

Q. When you were first talking to Mrs. Ott about the pregnancy—let's strike that—

After you first talked to Mrs. Ott about the pregnancy, did there come a time when you talked to her again about the pregnancy, after you had seen this letter, and when you changed your mind about who was the cause of the pregnancy?

Mr. McLaughlin: I object to this as immaterial.

The Court: Objection sustained.

Mr. Offutt: May I tender a proof, Your Honor, in connection with that?

The Court: No.

Mr. Offutt: May I ask him to read the statement in the second paragraph and see if that will refresh his recollection?

The Court: You have already shown him the statement.

Mr. Offutt: I want to ask him—

The Court: Just a moment. You cannot ask the witness to refresh his recollection about a matter that the Court has excluded. I have excluded this question.

By Mr. Offutt:

Q. Does the statement that you have read there, which you identify as your statement, does that relate that there was anything said, other than what you have just
1108 stated, with reference to the conversation with Mrs. Ott, about the abortion and the pregnancy?

Mr. McLaughlin: I object to this, Your Honor.

The Court: Objection sustained.

Mr. Offutt: I tender the statement to show this.

The Court: The Bedell case holds that a statement of that sort may not be offered in evidence, because the witness was called by you.

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1112 Mr. Offutt: The conversation between them, was
1113 that excluded, Your Honor? That's what I want to ask him about.

The Court: You want to ask what?

Mr. Offutt: I want to ask him about the talk between Mary Lee Ott on that occasion and himself. That's what I am asking.

The Court: I am going to limit this question in this way: You may ask him on that occasion if they discussed the abortion, and if so, what the discussion was, but beyond that you may not go.

I am not going to let you pry into any private conversations that this witness or any other witness may have had with somebody else that has nothing to do with this case.

Mr. Offutt: The credibility of this Ott woman is in issue; that's the purpose of it.

Mr. McLaughlin: Oh, if Your Honor please—

The Court: I told you before, you may not cross-examine one witness concerning the credibility of another witness.

Mr. Offutt: Your Honor said cross-examining; I am not cross-examining, Your Honor.

The Court: I have ruled.

Mr. Offutt: I am not cross-examining, Your Honor.

The Court: I said you may not examine one witness concerning the credibility of another witness.

Mr. Offutt: Can I do it, Your Honor?

The Court: I have excluded this. And I invite no response to my ruling.

1114 If you wish, you may note an objection, but that is as far as you may go.

Mr. Offutt: I object to it.

The Court: Very well; your objection is noted.

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1116 The Court: Did you give her any reason why you wouldn't give her any money to have the abortion performed?

The Witness: I didn't have the money in the first place, and in the second place I couldn't see it.

By Mr. Offutt:

Q. Will you explain to us why you couldn't see it? Tell us what you said to her about that.

The Court: No, I think you have gone into the matter sufficiently.

By Mr. Offutt:

Q. Don't you have the reason set forth in there, sir?

Mr. McLaughlin: I object to this.

The Court: I excluded this question, Mr. Offutt.

Mr. Offutt: If Your Honor please—

The Court: I have excluded the question.

Mr. Offutt: All right.

The Court: You may note an exception and that protects your record.

Mr. Offutt: I offer a tender of what the statement shows and what he would say, if permitted to answer.

The Court: You may have the statement marked for identification and it will become a part of the record, Mr. Offutt.

Mr. Offutt: Very well. May I see the Ott statement?

The Court: What are you requesting to be shown?

1117 Mr. Offutt: The Ott statement.

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1122 The Court: This witness testified there were three telephone calls to Mount Alto Hospital, and one to Dr. Bender. You can't go over the same ground again.

Mr. Offutt: Did you say he said two calls to Mount Alto?

1123 The Court: The record—

Mr. Offutt: I am asking what Your Honor said; I didn't hear it.

The Court: I am sorry. You may proceed. I am excluding this question because you have been all over that.

By Mr. Offutt:

Q. Were you talked to by Detective Sergeant John L. Sullivan?

Mr. McLaughlin: I object to this; it is immaterial, Your Honor.

The Court: Objection sustained.

By Mr. Offutt:

Q. Did you contact the police, or did they contact you?

Mr. McLaughlin: I object to this.

The Court: Objection sustained.

Mr. Offutt: I object to you looking over at counsel when I ask the question, and then Mr. McLaughlin stands up.

The Court: I think that is an insolent remark.

Mr. Offutt: Sir?

The Court: I think that is an insolent remark, and a contumacious remark.

Mr. Offutt: Your Honor looked over here. I want the record to show that, **Your Honor.**

The Court: I say you are contumacious and insolent. Don't repeat that conduct.

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1125 Q. Since reading this statement today can you tell us whether when you met George Christenson that time you had any argument with him and between the three of you there at 3935 Georgia Avenue?

Mr. McLaughlin: I object to this.

The Court: Objection sustained. This is all irrelevant.

By Mr. Offutt:

Q. Wasn't George Christenson angry with you?

Mr. McLaughlin: I object to this, if Your Honor please.

The Court: You are trying to evade my ruling. I ruled that out, Mr. Offutt, and you bring it up in another form; you must not do that.

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1127 Q. Oh—Mr. Jones, pointing out this lady sitting here next to Mrs. Ott, in the first row in the seats in the courtroom, do you know this lady? A. I have seen her.

Q. Do you know her name? A. No, I don't recall her name.

Q. Where did you see her?

Mr. McLaughlin: It is immaterial, Your Honor.

The Court: Objection sustained.

By Mr. Offutt:

Q. Did you see her in January?

Mr. McLaughlin: I object to that.

The Court: Objection sustained.

By Mr. Offutt:

Q. Well, when did you first met her?

Mr. McLaughlin: I object to that, Your Honor.

The Court: I sustained the objection.

Q. Didn't you hold yourself out to be—oh, may I come to the bench, Your Honor?

The Court: No, you may not come to the bench.

Mr. Offutt: Shall I ask the question?

1128 The Court: No, you may not come to the bench.

Mr. Offutt: Shall I ask the question and have you rule on it? I am not sure of Your Honor's ruling; there have been so many things you objected to and ruled on and I am not sure of this question, so I don't want to evade or to be accused of evading or invading Your Honor's ruling. May I ask Your Honor at the bench what the ruling is?

The Court: No, you may not. Proceed.

Are there any other questions of this witness?

Mr. Offutt: Beg pardon, sir.

The Court: Are there any other questions of this witness?

Mr. Offutt: I want to ask this question, but I am not sure about it. Shall I ask it?

The Court: That is for you to determine.

Mr. Offutt: All right; it might be an improper question, Your Honor.

The Court: Then don't ask it.

Mr. Offutt: But I don't know.

The Court: If you think it is improper, then don't ask it.

Mr. Offutt: It might be improper. If Your Honor ruled it out, I don't remember.

The Court: You should remember.

Mr. Offutt: I am telling Your Honor I don't remember,
and that's why I want to come to the bench. I don't
1129 want to be accused of evading Your Honor's ruling.
I don't remember.

Shall I ask the question before I come to the bench?

The Court: Don't address any interrogations to the
Court.

Mr. Offutt: I am sorry; I am just asking for Your
Honor's ruling.

The Court: Now, don't ask it again.

Mr. Offutt: All right.

By Mr. Offutt:

Q. Did you, Mr. Jones, tell this lady that you were the
husband of Mary Lee Ott at 3009 Q Street? A. I did not.

Mr. McLaughlin: I object to that as immaterial.

The Court: Just a moment.

Mr. McLaughlin: Well, he has answered it now.

The Court: I didn't hear your objection.

Mr. McLaughlin: I say he answered it.

I object to it as being immaterial.

The Court: I say that evades my ruling, because I ruled
before, and I ruled yesterday, you may not inquire into
those matters.

I think it is the duty of counsel to remember the Court's
rulings.

I think this was an outrageous question, and I am going
to strike the answer from the record, because the
1130 witness was under no obligation to answer it.

Mr. Offutt: I have no further questions, Your
Honor.

Mr. McLaughlin: I have no questions.

The Court: You may step down.

(The witness left the stand.)

Mr. Offutt: Mrs. Steerman, will you step up, please?

Thereupon,

Myrtle A. Steerman

was called as a witness by the defendant, and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Offutt:

Q. Mrs. Steerman, would you tell us your full name, please? A. Myrtle A. Steerman.

Q. And that is spelled S-t-e-e-r-m-a-n? A. That is right.

Q. Mrs. Steerman, do you live at 3009 Q. Street, Northwest? A. I do.

Q. And do you operate a rooming house there, a guest house? A. That is right.

Q. You live there with your husband, of course? A. Certainly.

1131 Q. Mrs. Steerman, do you know the lady I am indicating, Mrs. Mary Lee Ott, the lady in the first row— A. (Interposing) I do.

Q. (Continuing) —of the seats, in the courtroom? A. Yes, sir.

Q. And do you know this gentleman I am indicating, sitting next to her? A. Well, I thought I did, but I don't guess I did.

Q. The gentleman in the Navy uniform that just left the witness stand? A. That's right.

Q. What is his name? A. Well—

The Court: Just a minute.

Mr. McLaughlin: I object to this, Your Honor; it is immaterial.

Mr. Offutt: If Your Honor please, I object to Your Honor raising your hand like that. I don't—

The Court: Now, that is an insolent remark.

Mr. Offutt: I want the record to show you raised your hand.

The Court: I think you are losing your mind, Mr. Offutt.

Mr. Offutt: I am doing what the Lewis case decision says I should do. I want the record to show these things.

The Court: Proceed with the next question.

1133 Q. Did this gentleman, Mr. Jones, live at your house at 3009 Q Street, Northwest? A. Yes.

Mr. McLaughlin: I object.

The Court: Just a moment. Don't answer too fast. Objection sustained.

Mr. Offutt: She has already answered that yes, Your Honor.

The Court: The answer will be stricken, and this ruling will go to this entire line of inquiry. It is immaterial whether Mrs. Ott or Mr. Jones or anyone else lived at this lady's house, and I shall exclude that.

Mr. Offutt: May I have an exception to that exclusion, Your Honor?

1134 The Court: Yes, you may.

Mr. Offutt: And tender the proof at this time of what I would prove by this witness, so that the record would be complete?

The Court: You may make your offer of proof in open court, but make it very brief.

Mr. Offutt: By this witness I would prove that on November 7, 1951, Mrs. Mary Lee Ott came to the house there and told them that—told Mrs. Steerman that they were man and wife, and gave the name of Mr. and Mrs. W. A. Ott.

The Court: I am going to exclude all that. I told you before I would not permit that subject to be explored.

Mr. Offutt: I am making a tender of what that proof will shew.

The Court: That is the only tender I will permit you to make.

Mr. Offutt: There is another tender.

The Court: It has to relate to some other subject.

Mr. Offutt: It relates to something else.

The Court: I say if it relates to some other matter you may state it.

Mr. Offutt: In open court? I would rather do it at the bench.

The Court: Yes; yes. I don't want you coming to the bench.

1135 Mr. Offutt: All right. As to the credibility of the witness Ott—

Mr. McLaughlin: I object.

The Court: Now make your tender and make it quickly and briefly.

Mr. Offutt: I want to show by this witness that—

Mr. McLaughlin: If Your Honor please, I think he ought to ask the questions and see whether or not they are admissible.

The Court: No. I excluded the whole line of inquiry.

Mr. Offutt: This is just a tender of proof, Your Honor. Shall I go ahead, Your Honor—he objected, I take it—all right—

I want to show by this witness that Mrs. Mary Lee Ott told Mrs. Steerman that her husband was down at Quantico, Virginia—

The Court: I am going to exclude all that. That is immaterial.

We will stop further tenders. I will exclude that whole line of inquiry.

I told you before, I told you day before yesterday, I will not permit any testimony as to the personal lives of these people, except as they are connected with this case.

Mr. Offutt: All right.

By Mr. Offutt:

1136 Q Directing your attention—

So that I will have the record, may I have an objection?

The Court: Yes, and the objection is noted.

By Mr. Offutt:

Q. Mrs. Steerman, did there come a time when you—before today when did you first talk with me?

The Court: I am going to exclude that.

Mr. McLaughlin: Let him go, Your Honor; let him bring it out.

The Court: What is it?

Mr. McLaughlin: I say, I have no objection to that question.

Mr. Offutt: I object to Mrs. Ott speaking out in this court; she is directing some remark to me.

Mr. McLaughlin: I object to all this sensation.

Mr. Offutt: I want the record to show that.

The Court: Now, I think you are speaking out of turn, Mr. Offutt.

Mr. Offutt: I only want the record to show it.

The Court: Now the Court doesn't accept your statement.

Mr. Offutt: I object to her—I am standing out here.

The Court: Now, just a moment. You may answer her question.

Read the question, please.

The Reporter (reading): "Question: Mrs. Steerman, did there come a time when you—before today when did you first talk with me? A. Well, I guess it has been about two or three weeks ago. I don't remember the exact date, of course.

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1154 By Mr. Offutt:

Q. When I came to see you and your husband, and having in mind now the conversation that Mr. McLaughlin asked you about—

The Court: I told you to go back to your proper place.

Mr. Offutt: I am going to show her this exhibit. I can't do it back here, Your Honor.

Mr. McLaughlin: As I understand that exhibit, Your Honor, Your Honor, well, extenuated himself in allowing the defense to see that exhibit.

The Court: What is the exhibit?

Mr. McLaughlin: It is the statement of Miss Ott, and it was really for the purpose of trying to impeach the witness.

The Court: You may not use that in connection with this witness.

Mr. Offutt: May I ask my question without interruption by the Court?

The Court: You may not show that to the witness.

Mr. Offutt: May I ask my question before an objection is made and not be interrupted?

The Court: I shall not permit you to show that to this witness.

I allowed you to see it for a certain specified limited purpose.

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1163 **Arthur J. McLaughlin**

was called as a witness by the defendant, and being first duly sworn, was examined and testified as follows:

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Direct Examination:

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1167 Q. Now then, referring now to Sunday, June 1st—

A. (Interposing) Sunday, June 1st?

Q. Sunday, June 1st, after this case started trial— A. (Interposing) Started—yes.

1168 Q. All right—there came a time, did there not, when you learned that Mrs. Ott had called me at my house on Sunday night— A. (Interposing) No.

Q. (Continuing) —on my telephone, from the Sex Squad room, did you not? A. No; no; no. That morning I got up about 11 o'clock and went down to St. Patrick's Church, and then I went out to the ball game.

Mr. Offutt: If Your Honor please, I move that that be stricken.

The Witness: That is my entire day.

Mr. Offutt: I move to strike that out, and I object to Your Honor smiling.

The Court: You are insolent, Mr. Offutt; that is another case of insolence.

Mr. Offutt: I merely want it on the record.

I submit I am entitled to have the question answered, and not be facetious with me, because I am serious about this.

The Court: I think this was a serious answer. He answered you what he did during the day.

Mr. Offutt: I asked him a specific question and he said he did not, and I don't think we need the other explanation, whether he went to St. Patrick's Church, or what church he went to. It was done for an obvious reason.

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Jacob Stein

was called as a witness for and on behalf of the defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Offutt:

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Q. Mr. Stein, you are a lawyer practicing in the
1181 District of Columbia? A. I am.

Q. And are you associated with me in my offices at
927 15th Street, Northwest? A. I am.

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1188 Q. Now, Mr. Stein, do you know a George A. Christensen? A. I do.

Q. And did you talk to him at any time in connection with this case? A. I talked to him on May 27 in the cell block downstairs.

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1189 Q. Did he tell you when he had last talked to Mr. McLaughlin about this case?

The Court: Objection sustained.

1194 Q. Now, did Mr. Christenson ever tell you, when you were talking with him in the cell block on that day, that he did or did not see the statement of Mary Lee Ott?

The Court: I am going to exclude that, because that is subject to the same ruling that I just now made.

You are repeating the same matter.

1195 Q. Did Mr. Christenson in the cell block tell you that he was in a spot in this case?

Mr. McLaughlin: I object to this, Your Honor.

The Court: Objection sustained.

Q. Reading now from page 149, where I asked— Oh, did Mr. Christenson tell you he didn't—did he refuse to talk to you about the facts in this case?

Mr. McLaughlin: I object to that, Your Honor.

The Court: Objection sustained.

1196 Q. Did Mr. Stein tell you that Mr. McLaughlin told him not to talk about this case to anybody?

Oh, I mean Mr. Christenson.

Did Mr. Christenson tell you that Mr. McLaughlin, in that same interview, told him not to talk to anybody about this case?

Mr. McLaughlin: I object to this, Your Honor.

The Court: Objection sustained.

1197 Q. Did you ask Mr. Christenson just to tell you the truth about what happened?

Mr. McLaughlin: I object to this, Your Honor. It is immaterial.

The Court: Objection sustained.

1198 Q. Did you ask him the question, "Did anybody promise you anything for your statement?" when you were downstairs?

Mr. McLaughlin: I object to this, Your Honor. It is immaterial.

The Court: Objection sustained.

Q. Will you tell the Court and jury what Mr. Christenson said at that interview, and what you said?

Mr. McLaughlin: I object to this, Your Honor.

The Court: Objection sustained.

1199 Q. Coming now to the Sunday before this trial began, May 25—I am looking at the calendar which shows the date—were you in my office when I made a telephone call, sir? A. I was.

Q. And could you tell us about what time of day it was: do you recall? A. I would say it was about five o'clock.

Q. And during the course of my telephone conversation, did you hear the part which I would say into the telephone as I was talking? A. I did.

Q. And did there come a time when I asked the person on the other phone, the other side of the phone, if they would repeat a question—I mean, repeat an answer which they had given me, or a statement?

1200 Mr. McLaughlin: I am going to object to this, Your Honor.

The Court: Objection sustained.

Q. Did you hear the name repeated as to the person talking on the other phone, by me?

Mr. McLaughlin: I object to this, Your Honor.

The Court: Objection sustained.

1201 Q. When I made the call, will you tell us what I
said, first, into the phone?

Mr. McLaughlin: I object to this, Your Honor.

The Court: Objection sustained.

Q. Did you hear me ask the question to the person on the
other end of the telephone, "Mrs. Ott, are you mad with
the doctor, Dr. Peckham?"

Mr. McLaughlin: I object to this, Your Honor.

The Court: Objection sustained.

1202 Q. Did Mary Lee Ott say on the telephone on that
1203 occasion that she was mad with the doctor, and she
tried to get him to help her, and he wouldn't help
her?

Mr. McLaughlin: I object to this, Your Honor.

The Court: Objection sustained.

1218 **Richard Brown**

was called as a witness for and on behalf of the defendant
and, having been first duly sworn, was examined and testi-
fied as follows:

Direct Examination

By Mr. Offutt:

1219 Q. You are appearing here in response to a sub-
poena served on you? A. That is correct.

The Court: It makes no difference how he is ap-
1220 pearing here. He is here. You may examine him.

Mr. Offutt: Yes, sir.

By Mr. Offutt:

Q. Now, Mr. Brown, did you have a--pardon me.

I direct your attention to this lady who is seated here in the first row of the courtroom here, in the light blue dress.

Do you know her? A. Yes, I do.

Q. And what is her name? A. Beg pardon?

Q. What name do you know her by? A. Mrs. Christenson.

Mr. McLaughlin: I object to that, Your Honor.

The Court: I am going to exclude that.

Objection sustained.

I have ruled in connection with other witnesses, Mr. Offutt, that I will not permit this sort of testimony about Mrs. Ott, because it is immaterial and irrelevant to the issues of this case.

Mr. Offutt: If Your Honor please, I—

The Court: I made that ruling several times and I made it very clearly.

Mr. Offutt: It is already in evidence by her own statement, Your Honor.

The Court: You cross-examined her about some of these matters.

Mr. Offutt: Yes, sir.

The Court: And I gave you considerable leeway on cross-examination, because she was a key witness for the Government, and you were entitled, as a matter of right, to leeway in cross-examination, but I am not going to permit you to call witnesses to blacken her character, and I have told you that before.

Mr. Offutt: That is not the purpose, Your Honor. I did not call him for that, and I object to that statement, Your Honor, and move it be stricken, and move Your Honor to tell the jury to disregard it.

The Court: No. Don't ask the Court to strike its own statements from the record.

Mr. Offutt: I move Your Honor to ask the jury to disregard it.

The Court: No. The jury is not going—I am not going to ask the jury to disregard my statement. My statement was well considered.

You have done this several times during the trial, and I don't want it again.

1222 Q. Was this lady a tenant at your place? A. Yes, she was.

Q. When was it, sir? A. During the month of March, April, and May.

Q. And when did she move out? A. As of May 31st, approximately.

Q. Was there anyone else that lived there at that time?

Mr. McLaughlin: I object to this as immaterial.

The Court: Objection sustained. This is along the same line.

I have made my ruling, Mr. Offutt, and you must not try to evade it by indirection.

1223 Q. Has Mrs. Ott been to see you, to talk to you, since you received a subpoena in this case, sir?

Mr. McLaughlin: I object to this.

The Witness: I beg your pardon?

The Court: Objection sustained.

Mr. Offutt: What happened, sir?

1224 The Court: Objection sustained.

1228 **Henry Lincoln Peckham, Jr.,**

the defendant, was called as a witness in his own behalf and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Offutt:

1229 Q. Do you have a sister?

Mr. McLaughlin: I object to this, Your Honor.

The Court: Objection sustained.

Mr. McLaughlin: It is immaterial.

By Mr. Offutt:

Q. Do you have a telephone there? A. Yes, I do.

Q. And the evidence has shown here that a Josephine Peckham's name was listed at that telephone.

Who is that? A. That is my sister.

1231 Q. Did you have any special training of any kind?

A. Yes, at Johns Hopkins University.

Q. Any other special training?

Mr. McLaughlin: I think he has identified the witness enough, Your Honor.

The Court: Objection sustained.

Mr Offutt: All right.

The Court: I think the witness's life story is irrelevant.

1232 Mr. Offutt: I am no going into the life story, Your Honor.

The Court: I sustain the objection.

By Mr. Offutt:

Q. After your service in the United States Public Health Service, what did you do then? A. I went to work for a doctor here in Washington.

Mr. McLaughlin: I am going to object to this, Your Honor. I think he has identified the witness enough.

The Court: Objection sustained.

Mr. Offutt: If Your Honor please,—

The Court: I am not interested, and I am sure the jury is not interested, in this witness's life story.

Mr. Offutt: If Your Honor please, I object.

I have some questions which later I wish to propound to this doctor, as a physician, and a man of experience in certain lines.

1233 The Court: This is the defendant taking the stand in his own behalf. He is not being called as an expert witness.

Mr. Offutt: He will be later, Your Honor.

The Court: Well, if we come to that, then the question of his qualifications may arise, but I would not let you go into his life history at this time.

Mr. Offutt: No, but may I show the experience just briefly, with the three doctors he associated with?

Mr. McLaughlin: I object to that, Your Honor.

Mr. Offutt: I made that statement in the opening statement, Your Honor.

Mr. McLaughlin: I object at this time, Your Honor.

Mr. Offutt: All right, sir.

The Court: Mr. Offutt, you will not continue talking after I have made my ruling. I have sustained Mr. McLaughlin's objection.

In order to preserve your rights, you may note an objection in a respectful manner and a respectful tone.

Mr. Offutt: All right.

The Court: That is what the Court will hold is your only right after an adverse ruling.

Mr. Offutt: I most respectfully urge Your Honor at this time, may I make a proffer for the record?

The Court: No.

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1238 Q. Did you ever have any conference with Mr. George A. Christenson, the gentleman from the jail, who testified here, with respect to performing an abortion?

The Court: Wait just a moment.

1239 What do you mean by calling him the gentleman from the jail? He is not from the jail.

Mr. Offutt: I thought he said he was from the jail.

The Court: But you have no right to identify a person that way.

Mr. Offutt: I thought that is what he said. Mr. McLaughlin said that.

The Court: Now, that is no way to refer to a witness.

Mr. Offutt: Well,—

The Court: Proceed.

Mr. Offutt: All right.

By Mr. Offutt:

Q. Did you have a talk or conference with this gentleman, George—

Is it all right to say it, Your Honor?

—this gentleman, Mr. George A. Christenson, with respect to performing an abortion on Mary Lee Ott, or anyone else?

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1241 Q. Now, those entries on the log there, pointing specifically to the last entry on that log on that date, Friday, January 18, what was the name of that? Was that the last patient in? A. Yes, that was the last patient that day.

Q. And what was the name of that patient? A. That was Mrs. Eleanor Kennedy, 2000 Connecticut Avenue, Northwest.

Q. What was that address? A. 2000 Connecticut Avenue, Northwest.

Q. Where does she work? A. Woodward & Lothrop's.

Q. In what department? Do you know?

The Court: Now, Mr. Offutt—

The Witness: She is a buyer.

The Court (Continuing): —I am going to exclude that as irrelevant.

Mr. Offutt: Beg pardon?

The Court: I am going to exclude that as irrelevant.

Mr. Offutt: What part of it, Your Honor? All of it?

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1242 The Court: I don't think you have a right to identify patients who had nothing to do with this case. I presume this lady has nothing to do with this case.

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Q. Did you say—when you mentioned Mrs. Kennedy's name, did you say Miss or Mrs.? A. Mrs.

The Court: I told you I would not permit you to inquire about other patients who have nothing to do with this case.

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1253 Wednesday, June 11, 1952.

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1258 Q. Showing you Government's Exhibit 4, will you tell us what that is? A. That is a card with the name and address and age and so forth of Mary Ott, and the number, the card number on it.

It also has some information on it relative to a certain date that she was in my office.

Q. That information which is written on there, is that in your writing? A. Yes.

Q. And what is the part that is in your writing? Would you read that?

1259 The Witness: Is that all right to read that, Your Honor? It has to do with the condition of the patient?

Mr. McLaughlin: It is in evidence.

Mr. Offutt: This is the treatment of the patient, Your Honor.

Mr. McLaughlin: It is in evidence.

Mr. Offutt: This has to do with the treatment of the patient. This is in evidence.

The Court: The card is in evidence?

Mr. Offutt: Is there any question of privilege? This has to do with the treatment by the doctor of the patient; is there any question of privilege?

The Court: It is for the doctor to determine whether he wants to reveal the information concerning his patient or not.

Mr. Offutt: If Your Honor please, I submit it is a matter of privilege, and only the patient can waive the privilege.

Mr. McLaughlin: I think the card is in evidence, if Your Honor please, and he is entitled to read whatever is on it. Let him read whatever is on it.

Mr. Offutt: It is a matter of privilege.

The Court: It is in evidence.

Mr. McLaughlin: Absolutely.

Mr. Offutt: That's right, Your Honor, but it is a matter of privilege.

1260 Mr. McLaughlin: There is no privilege here at all.

The Court: Just a moment. I have no power to waive anybody's privilege.

You have asked the doctor to read what is on the card. The Government has not objected.

Mr. McLaughlin: No; let him read it; it is in evidence.

The Court: And he may answer the question.

Mr. Offutt: I ask Your Honor at this time—I think the doctor should be advised to answer, that it is the privilege of the witness which has previously been invoked by her, that if she waives the privilege of that card—that has never been specifically waived by her.

The Court: No.

Mr. McLaughlin: The card is in evidence for what it is worth.

The Court: The card is in evidence, and there will be no questions addressed to the Court. The Court does not answer questions.

Mr. Offutt: All right.

Mr. McLaughlin: Let him read whatever is on it.

By Mr. Offutt:

Q. Well, Doctor, does that notation refer to treatment of this patient, Mrs. Mary Lee Ott? A. Yes, diagnosis.

Q. Has she ever told you that she would waive her
1261 privilege, or anything?

Mr. McLaughlin: I object to any question along that line.

The Court: Objection sustained.

Mr. McLaughlin: If he wants to read the card, whatever is on the card, the card is in evidence, in toto, from beginning to end. He can read it or he can describe it.

Mr. Offutt: I object to this, if Your Honor please.

The Court: Objection overruled.

Mr. Offutt: Object to it on the basis Your Honor has ruled—

The Court: No.

Mr. Offutt (Continuing): —that the privilege of the patient she must give us here; the patient must waive herself.

The Court: Objection sustained.

Mr. Offutt: If Your Honor please, I move Your Honor to make a ruling as to whether Your Honor still adheres to the ruling yesterday on privilege, as stated by Your Honor, that the person who is the patient must waive it, or whether the doctor can answer that question relating to the treatment he gave her, without her specifically waiving it.

The Court: Objection overruled.

Mr. McLaughlin: May I say that the repeated questions asked by my friend here this morning is merely for the purpose of trying to aggravate the Court, and is just
1262 trying to bait the Court into committing error—that's all.

Your Honor has ruled on that question a half hour ago.

Mr. Offutt: I object to that statement.

The Court: I think your position, Mr. McLaughlin, is well taken.

I will deny your motion, Mr. Offutt.

By Mr. Offutt:

Q. Doctor, suppose you answer the question. A. Well, I don't think I ought to answer it unless Miss Ott specifically waives her privilege.

Q. Since it is in evidence, and has been shown—all right—suppose I take the card.

This portion which is written in ink on there, in pen and ink, is that your handwriting, sir? A. Yes.

Q. And where it says 1-9-52, does that refer to January 9, 1952? A. It does.

Q. Where it says "Kidney operation November 1951; cold-head," will you explain—

Mr. McLaughlin: Now, may I state for the record, Your Honor, at this time that all his baiting with the Court, just five minutes ago, as to the confidential question as to what was on this particular card, he stands right here now and reads what is on the card; it only shows it was his
1263 alterior motive in asking the questions preliminary to that; that they were of no value at all, and was done merely for his own purpose and to aggravate the Court.

Mr. Offutt: I object to the interruption of my questioning while I am interrogating the witness, by Government counsel, which was done, I submit to Your Honor, deliberately to entice me into some situation where Your Honor can do something to me.

I submit, Your Honor, it is purposely, it is planned and it is deliberate, and I move—

The Court: Now, Mr. Offutt, you may proceed with the examination of this witness.

Mr. Offutt: I move that he be instructed not to interrupt me until I complete my questioning.

The Court: You may proceed with the examination of the witness.

Mr. Offutt: Will Your Honor deny that motion, please?

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1295 Mr. Offutt: Your Honor, I don't want to go beyond Your Honor's ruling; did you rule that I couldn't go into anything that happened over at headquarters after he was arrested?

The Court: I am not going to rule in advance. I don't know what you are going to ask him.

Mr. Offutt: I just want to know if you ruled that out yesterday.

The Court: Oh, you may not ask the Court any questions. I think you are just sparring for time.

Mr. Offutt: I am not sparring for time.

The Court: I think you are anxious not to continue this examination until after the recess.

Mr. Offutt: I object to that, Your Honor. I am not sparring for time at all. I am asking Your Honor so I won't go beyond your ruling, that's all, I respectfully submit.

The Court: Mr. McLaughlin, did you want to be heard?

Mr. McLaughlin: Yes. He is stalling for time because he realizes the witness wants to talk to him, and that's what he is stalling for time for.

The Court: That is quite apparent to the Court.

Mr. McLaughlin: Absolutely.

Mr. Offutt: I object to that statement.

Mr. McLaughlin: That has been his conduct throughout the trial.

Mr. Offutt: I object to him interrupting me; he is continually doing it when I am addressing the Court, and I object to it.

The Court: It is ten minutes since you asked your last question of this witness—I have been watching the clock. Now, proceed.

By Mr. Offutt:

Q. Oh—now, Dr. Peckham, do you have any—did you have any sign on the outside of your offices at 640 Princeton Place, Northwest? A. Yes.

Q. In May, 1951—from I think February, 1951—January—up through the summer of 1951, did you have an office anywhere else? A. Yes.

Q. Where was your office? A. 428 8th Street, Southeast.

1297 Q. How long did you have an office there? A. I had an office down there—

Mr. McLaughlin: I object, Your Honor, that is immaterial.

The Court: Objection sustained.

Mr. Offutt: If Your Honor please, this is in line with the testimony of George Christenson who said he went to the house at that place, on Princeton Place, in February, and the witness Mary Lee Ott said she went there sometime—

The Court: There is no testimony about any other office.

Mr. Offutt: I am bringing it out now because they said they went to Princeton Place to his office there. I want to show where his office was then.

The Court: He just testified that he has been at Princeton Place for a number of years.

Mr. Offutt: Oh, he lived there, sure, he was born—he lived there for a long time, but he didn't have his office there, and that's what I want to bring out, Your Honor. He didn't move his office there until sometime in '51.

Mr. McLaughlin: I will withdraw the objection.

The Court: Mr. Offutt, you must not address the Court in such an excited and provocative manner.

Mr. Offutt: I am not excited, Your Honor, or in a provocative manner; I am merely saying that—

The Court: And you must address the Court in a courteous tone.

Mr. Offutt: I am addressing you in a most
1298 courteous tone, I respectfully submit to Your Honor.

The Court: No, you are not. You must not use such a belligerent tone to the Court.

Mr. Offutt: I am not using a belligerent tone, Your Honor.

The Court: Now, proceed.

Mr. Offutt: I am addressing Your Honor in a reasonable tone; I've got a cold; it is very obvious my voice is not my usual one, Your Honor.

The Court: Proceed.

Mr. Offutt: And I object to Mr. McLaughlin interrupting me from time to time and being interrupted.

.
1300 Mr. Offutt: A motion that has been filed and ask the Clerk if he has it—a written motion that has been filed, and ask Your Honor to pass on it?

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The Court: What is the motion about?

Mr. Offutt: It is a motion for a mistrial, predicated upon very serious grounds.

The Court: We will send for the motion.

You may proceed.

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1303 The Court: I have received the motion from the Clerk's office and I have marked it denied, Mr. Offutt.

Mr. Offutt: You did?

The Court: I have received the motion and I have marked it denied.

Mr. Offutt: Did you read it, Your Honor? May I ask Your Honor, did Your Honor read it?

The Court: What is that?

Mr. Offutt: May I know whether Your Honor read it?

The Court: Yes, I read it and I have marked it denied.

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1305 Q. State whether or not the policemen took those papers you have referred to. A. Yes, sir, he did.

Q. And how about this book? A. No, he didn't take the book.

Q. Have you ever had those papers returned to you? A. No.

Q. Did they have the name—oh, I think you already answered that and said they were personal friends. A. That's right.

Mr. Offutt: May I see the papers that were kept, Your Honor?

1306 The Court: Have you any such papers?

Mr. McLaughlin: We have no such papers, if Your Honor please.

May I say at this time that the motion—

Mr. Offutt: I object.

The Court: Just a moment.

Mr. McLaughlin: We have no such papers as my friend refers to.

May I say at this time that the police, at the time of the arrest of the defendant—

Mr. Offutt: I object to anything further.

The Court: Don't interrupt counsel.

Mr. Offutt: I object to anything further, Your Honor.

The Court: No, it is for the Court to determine how much counsel may say.

Mr. Offutt: May we come to the bench?

The Court: No.

Mr. McLaughlin: At the time the police arrested the defendant, on February 26, certain properties were taken from the defendant, in the defendant's office.

At the time those properties were taken the police sat down with the defendant and gave the defendant an itemized list of everything that they took; in fact the defendant named the things for the police that they had taken.

1307 After that property was recovered and taken by the police, at the time of the arrest of the defendant, a motion to suppress was filed by the defendant for the return of the property. The motion was heard before Judge Keech, and at that time—

Mr. Offutt: I object to this.

Mr. McLaughlin (Continuing): —Judge Keech—

Mr. Offutt: I object to that.

Mr. McLaughlin (Continuing): —ordered returned—

The Court: Stop; don't interrupt.

Mr. Offutt: May I interrupt?

Mr. McLaughlin (Continuing): —part of the property and the property was returned to the defendant, on the demand of the defendant, was—

Mr. Offutt (Interposing): If Your Honor please—

Mr. McLaughlin (Continuing): —itemized by the Court.

Mr. Offutt: I object to this and I say it is highly improper.

The Court: Don't interrupt.

Mr. Offutt: Well, I move Your Honor to stop this dialogue on this matter.

The Court: Don't interrupt.

Mr. Offutt: Will Your Honor pass on this motion?

The Court: This is in answer to your request.

Mr. Offutt: May I be heard?

The Court: Don't interrupt.

1308 Mr. McLaughlin (Continuing): —and ordered the return of that property—

Mr. Offutt: I object.

Mr. McLaughlin (Continuing) —itemized by the Court as to what property was to be returned to this defendant. The Court signed an order for the return of that property to the defendant, on the demand on the part of the defendant, and Mr. Offutt was the attorney.

Mr. Offutt went to police headquarters and to the Property Clerk—

Mr. Offutt: I object.

Mr. McLaughlin (Continuing): —the Property Clerk gave him—

Mr. Offutt: I object to this.

The Court: Don't interrupt until counsel is through.

Mr. Offutt: I move Your Honor to stop him from talking.

The Court: I am denying your motion. Don't interrupt.

Mr. McLaughlin (Continuing): He has made a demand on me for the papers—

The Court: Will you resume your seat, please?

Mr. Offutt: All right. I object to your refusal to hear me.

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1332 Q. Dr. Peckham, have you had experience in the field obstetrics, in your practice, sir? A. Yes, lots.

* * * * *

Q. And the practice that you had on Eighth Street during that time—

Mr. McLaughlin: I object to this, Your Honor; it is immaterial.

The Court: Objection sustained.

1333 Mr. Offutt: If Your Honor please, I want to present the qualifications of this doctor, and experience in the field of obstetrics.

The Court: That is not the way to establish the witness' qualifications.

In order to shorten matters I will ask you to state, what do you want to qualify him as—as an expert in some field or other?

Mr. Offutt: I want to show that he has had such experience, wide experience, in the field of obstetrics and that type of work, and the knowledge and the experience in the field of his general practice of medicine, that he is qualified to state an opinion, to give an opinion.

The Court: Give an opinion on what?

Mr. Offutt: On the predisposition of this lady, Mary Lee Ott, with her condition and the history—

The Court: No, no.

Mr. Offutt (Continuing): —given by her—

The Court (Interposing): No, no; just a moment.

Mr. Offutt (Continuing): —to have an abortion.

The Court: Opinion in what field?

Mr. Offutt: I told you, in the field that would qualify him to give an opinion on the—like doctor—

The Court (Interposing): Will you concede that this—

Mr. Offutt (Continuing): —like Dr. Kilpatrick.

1334 The Court (Continuing): —that this physician has had experience that would qualify him?

Mr. McLaughlin: You mean to deliver children? No, I wouldn't say that.

Mr. Offutt: Well, I think I am entitled to it—he won't agree to it, and I assure Your Honor he has treated people for these conditions which Dr. Kilpatrick said she had, when she was in the hospital—peritonitis and those things.

The Court: You may proceed.

Mr. Offutt (Interposing): Urinary infections—

The Court: You may proceed.

Mr. Offutt (Continuing): —kidney infections.

The Court: You may proceed, but you must ask it in the proper form.

Mr. Offutt: Well, now—

The Court: Don't argue with the Court.

Mr. Offutt: I am not arguing with the Court, Your Honor.

The Court: Don't answer back to the Court, either.

Mr. Offutt: Oh, I thought Your Honor—I am merely trying to present my point.

The Court: Proceed with the next question.

Mr. Offutt: Thank you, Your Honor.

Your Honor, I object to your raising your voice like that and shouting at me, and I urge Your Honor not to do it.

1335 The Court: Well, you are misbehaving, Mr. Offutt.

Mr. Offutt: And I have a right—

The Court: And it is my function to hold the reins tight and preserve order and decorum in the courtroom.

Mr. Offutt: But not to yell at me, Your Honor.

And I submit I am entitled, and my duty is to make objections and to state for the record, and I am putting my objections on the record.

The Court: You have forfeited your right to be treated with the courtesy that this Court extends to all members of the Bar.

Mr. Offutt: I object to that and say that there is no justification for it. I have acted as I am required to do under

the law, as a member of the Bar, and I must speak and object when objectionable things are done.

The Court: You are not practicing like other members of the Bar do that come before this Court. You are not conducting yourself, rather, in the same manner in which other members of the Bar do.

Now, proceed.

Mr. Offutt: I object to that statement.

I move Your Honor for a mistrial, and I move you for a mistrial because the statement you have made is not justified by anything here.

The Court: Mr. Offutt, it is quite apparent to this
1336 Court that ever since the trial started your principal aim has been to cause some incident to happen to bring about a mistrial, and I will tell you right now that this trial is going to be completed, and there is going to be no mistrial declared.

Mr. Offutt: I don't want a mistrial, but I want to get the conduct and the courtesy I am entitled to have, and I object to this.

The Court: These are—

Mr. Offutt (Interposing): And I object to it and I want the record to show that you are raising your voice, and I object to it and I object to your raising your hand now—

The Court: Stop! Stop!

Mr. McLaughlin: I submit, Your Honor, he is just trying to be obnoxious at this time and he is just trying to arouse the ire of the Court.

I think Your Honor has been as indulgent with him, as much as you could, or should, and I think my friend is being very obstreperous.

The Court: I think your statement is quite correct, Mr. McLaughlin.

Mr. Offutt: I move for a mistrial on that statement, and move Your Honor to tell the jury to disregard it, and I ask you again, Your Honor, to give me an opportunity—

The Court: You may proceed.

1337 Mr. Offutt (Continuing): —to put in the record—

The Court: You may proceed.

Mr. Offutt (Continuing): —these things which I say are happening here.

The Court: You may proceed.

Mr. Offutt: And Your Honor is not according me the same treatment you are giving him.

The Court: You are misbehaving yourself.

Mr. Offutt: I deny that; I am doing nothing. I am objecting as I have a right to do.

The Court: Proceed.

Mr. Offutt: I have forfeited no rights, I move Your Honor, respectfully.

The Court: Proceed.

By Mr. Offutt:

Q. Now, Dr. Peckham—

I am sorry, Your Honor, I would like to have the record read so I can get the question and find out where I was. I am not just clear—these constant interruptions throw me off; I can't conduct the examination—it intimidates me, gets me nervous here, these constant statements by Your Honor, in the presence of the jury, indicating that I am barred—

The Court: Will you please suspend and stop talking?

The next utterance from your lips must be a question to this witness or I will close the direct examination and have Mr. McLaughlin proceed with the cross examination.

Mr. Offutt: I move Your Honor to have the last question and answer read so I can get where I am. That is what I have asked, if Your Honor please, most respectfully.

The Court: You have to put it in a respectful manner.

Mr. Offutt: I am asking you in a most respectful manner, and I will say the evidence in this court—anyone will say I am most respectful and I have been all through this trial, and I deny anything other than I am most respectful.

The Court: You have been disrespectful on many occasions.

Mr. Offutt: I deny that, Your Honor, that is not accurate, with all due deference to the Court.

The Court: Will you read the question, please?

1448 The Court: You have made your objection and I have overruled it.

Mr. Offutt: I never heard it. McLaughlin was talking so loud and interrupting me that I didn't hear it then.

The Court: Then I will raise my voice so that you may hear me.

Mr. Offutt: No, I would rather not have you raise your voice; that's my objection in this proceeding—I object to your raising your voice.

The Court: Then proceed. Apparently everybody else in the court can hear me. You were unable to hear me. Of course some people hear better than others, and for your benefit I am raising my voice so you will have no difficulty in hearing me.

1576 By Mr. Offutt:

Do you know what percentage of women you have, or men, or children? A. No. I never made any comparison to see what percentage of women or men are in my office. I don't care whether they are women or men. They pay just as well whether they are men or women.

Q. And do you have—

The Court: Just a moment. That has all been gone over.

1577 Mr. Offutt: I never asked a word about the percentage, your Honor.

Mr. McLaughlin asked that.

The Court: I know. He said he did not know.

Mr. Offutt: Well, all right.

The Court: Well, now he says he does not know.

Mr. McLaughlin: Sure.

The Court: So don't repeat the same thing on redirect examination, if he did not know about it on cross-examination.

By Mr. Offutt:

Q. In the general practice of medicine are there more women, more children, or more men, as patients, in the general practitioner's office?

Mr. McLaughlin: I object, your Honor.

The Court: Objection sustained.

• • • • •
1660 Friday, June 13, 1952

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Charlotte Maskey

1666 was called as a witness by the defendant, and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Offutt:

• • • • •

Q. Miss Maskey, are you engaged in the practice of law, associated with me at 907-15th Street, Northwest?

• • • • •

The Witness: Yes, I am.

• • • • •

1667 Q. Do you recall the day when Mrs. Charles Hodges, the mother of Mrs. Mary Lee Ott, testified here last? A. I do.

Q. After she had testified and left the stand, were you present when Mrs. Mary Lee Ott came into this courtroom and addressed me and the defendant here?

Mr. McLaughlin: I object to this, Your Honor.

1668 The Court: Objection sustained I don't see the relevancy of that.

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Q. Was there anybody else in the courtroom at that time? A. Mr. Offutt and myself and Dr. Peckham were in the courtroom.

Q. What time was that? What was that recess? A. It was a noon recess.

Q. And where were we at the time? A. I was at the counsel table collecting some papers, and you and Dr. Peckham were toward the back of the courtroom.

Q. Will you describe the--will you state what took 1669 place?

Mr. McLaughlin: I object to this, Your Honor; it is immaterial.

The Court: Objection sustained.

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Q. Can you describe the appearance of--will you tell us what happened while we were in the room at that time?

Mr. McLaughlin: I object to this.

The Court: Just a moment. Objection sustained.

Mr. McLaughlin: It is immaterial.

The Court: I have sustained the objection.

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Hugo Formato

1691 was called as a witness by the defendant, and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Offutt:

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Q. Where do you live? A. 1644-21st Street, Northwest.

Q. Is that The Officers Service Club of United Nations?
A. Yes, sir.

.

1692 Q. Directing your attention to Friday, May 30th, Decoration Day of this year, do you recall seeing me and Mr. Stein, the gentleman over here in the brown suit, in that club in the evening? A. Yes. I don't remember the date, but I remember seeing you there.

Q. Mr. Formato, will you tell us if during that time we were there, Mr. Stein and I and you went to the part of the club where they dance, the club part?

Mr. McLaughlin: I object to this, Your Honor.

The Court: Objection sustained.

By Mr. Offutt:

Q. Tell us where we went with you.

The Court: Objection sustained. This is not relevant or material to any issue of this action.

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Q. On that evening that you saw us at the club, will
1693 you tell the Court and jury whether or not in company with you we went to any portion of the club?

Mr. McLaughlin: I object to this.

The Court: Objection sustained as irrelevant.

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Q. Could anyone, except a member or a guest, come into the club and enjoy the facilities of that club, sir?

Mr. McLaughlin: I object to that.

The Court: Objection sustained. This whole matter is irrelevant.

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1780

June 16, 1952

1861 The Court: Now that the trial has concluded and the jury has retired, I am going to take up the question of the conduct of the defendant's counsel, Dorsey K. Offutt.

Under our system of law, every defendant is entitled to the effective aid and assistance of counsel. Full leeway must be given to members of the bar for the exercise of that right. Some allowance must even be made for an occasional lapse or minor transgression in the excess of zeal arising in the heat of advocacy. On the other hand, the task of counsel must be performed within the bounds of decency and within the limits of ethical conduct. As Mr. Justice Jackson said in *Sacher v. United States*, 343 U.S. 1, 9, if the ruling of the Court is adverse, "it is not counsel's right to resist it or to insult the judge—his right is only respectfully to preserve his point for appeal. During a trial, lawyers must speak, each in his own time, and within the allowed time, and with relevance and moderation."

In this case, throughout this trial, Dorsey K. Offutt, counsel for the defendant, has been repeatedly guilty of contumacious, contemptuous, and unethical conduct. He was warned by the Court, time and time again. He is not now being taken unawares. He did not heed any of the many warnings or admonitions that he received from this 1862 Court.

In accordance with the procedure prescribed by Rule 42(a) of the Federal Rules of Criminal Procedure, and approved by the Supreme Court in *Sacher v. United States*, 343 U.S. 1, I find Dorsey K. Offutt guilty of contempt of court. I have prepared and am filing a certificate in accordance with Rule 42(a), containing detailed findings of fact, and I sentence Dorsey K. Offutt to be committed to the custody of the United States Marshal for the District of Columbia for a period of ten days.

I also hereby call attention of the Committee on Admissions and Grievances to this matter in the urgent hope that the Committee will take immediate and energetic steps to purge the bar of the unworthy and unethical methods used by this unworthy member. The fact that he has not been precluded from pursuing them has become a reflection on

the legal profession and a thorn in the administration of justice. I hope that in the future no judge will be subjected to the ordeal of having this person try a case before him. If we had many such members of the bar, the health and longevity of trial judges might be seriously impaired. Fortunately, the ranks of the bar of the District of Columbia are singularly free from unworthy members. This is all the more reason why efforts should be made to maintain it on a high level.

1863 Dorsey K. Offutt is committed to the custody of the Marshal.

Mr. Offutt: If Your Honor please, I respectfully deny that there has been any contempt on my part.

The Court: Beg pardon?

Mr. Offutt: I respectfully deny that I have been guilty of contempt, and I ask that this matter be referred to another Judge.

The Court: The Court will not hear you.

Mr. Offutt: I ask Your Honor to give me an opportunity to get an attorney to represent me, and let me finish this case.

The Court: Under Rule 42(a) of the Criminal Rules, the Court may act summarily, without a hearing, in respect to a contempt committed in his presence.

Mr. Offutt: (Interposing): If Your Honor please, may I get an attorney?

The Court: You may get an attorney, if you wish, of course.

Mr. Offutt: If the Court please, will Your Honor stay the proceedings for a few minutes in order to let me get an attorney?

The Court: No, I will not; there will be no stay.

Mr. Offutt: I want to get an attorney—

1864 The Court: However, the Marshal will detain you in the Court House so that you will be available when the jury comes in to represent the defendant Peckham.

Mr. Offutt: If your Honor please, will your Honor not stay it for a minute? My mother is critically ill, and she is in this courtroom—won't you just delay it long enough for me to talk to my mother and arrange some matters with my mother?

The Court: I think the Marshal will arrange for you to do that. Of course you can talk to the Marshal about this.

Mr. Offutt: I don't want to talk to my mother behind bars; may I talk to her outside?

The Court: The Marshal may use his own discretion.

Mr. Offutt: Would your Honor just give me one moment here? I have another matter that is very important to a very aged client that is critically ill. He is 86 years old, and it is something that just came. Would your Honor stay this just long enough for me—

The Court: No, I shall not stay it. You have associates.

Mr. Offutt: I beg pardon?

The Court: You have office associates.

No, the Marshal may take you into custody.

1865 Mr. Offutt: Would your Honor permit me to call Mr. Leahy, or let me talk with him on the telephone?

The Court: You may call anyone you wish from the Marshal's office. I am sure the Marshal will make arrangements for you to use the telephone.

Mr. Offutt: May it be done outside the cell block?

The Court: That is in the discretion of the Marshal.

Mr. Offutt: Thank you.

The Court: Miss Maskey, you will see to it that the defendant Peckham remains in the Court House and is available when the verdict comes in; and you may have a copy of this Court's order.

Mr. David Smith: Your Honor—

The Court: The Court will not hear you.

(Thereupon, at 12:20 o'clock p. m., the Court recessed until 1:45 o'clock p. m.)

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1872 The Court: Ladies and gentlemen of the jury, this completes your service as jurors.

1873 You have been burdened with a longer service than the other members of the panel with whom you started as jurors. That is one of the things that occasionally happens.

I also realize that you had a difficult and a disagreeable task in this case. You have been compelled to sit through a disgraceful and disreputable performance on the part of a lawyer who is unworthy of being a member of the profession; and I, as a member of the legal profession, blush that we should have such a specimen in our midst.

I hope you have not gotten the wrong impression as to the legal profession or as to the administration of justice because such persons as we have had in this Court, defending this defendant, are very few and very rare. It just was your bad fortune to be confronted with and have to go through such a disagreeable ordeal.

It may interest you to know that after you retired to deliberate I found Dorsey K. Offutt, the defense counsel, guilty of contempt of Court, and sentenced him to ten days in jail for his misconduct. I did not do it earlier in the case because if I had it would have been incumbent upon me to stop the trial and declare a mistrial, and thereby the ends of justice might have been defeated.

I have no doubt that in convicting this defendant, on one count at least, you have done the right and just thing.

1874 This is the fourth time this defendant has been tried on abortion charges before this Court. In some way or other he was able to secure acquittal in the other three cases. At last justice has caught up with him.

I want to thank you for the time, the attention and the labor you have devoted to this case. The only real recompense that you get is a sense of gratification that you have performed your duty as citizens, because trial by jury is the keystone of the American way of administering justice. It is the best form of trial devised, both for the protection of

the public and the protection of the persons accused of crimes.

You will be excused from further service, with the thanks of the Court.

The defendant will be committed and the case will be referred to the Probation Officer for the usual pre-sentence investigation.

(Thereupon, at 8:40 o'clock p. m., the trial was concluded.)

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1876

Wednesday, June 25, 1952.

The above-entitled action came on for hearing on motion for a judgment of acquittal notwithstanding the verdict, or in the alternative for a new trial, before THE HONORABLE ALEXANDER HOLTZOFF, United States District Judge, at 1:45 o'clock p. m.

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1882 The motion for a new trial is replete with asser-
1883 tions that the Court made prejudicial remarks. There is no doubt of the fact that the Court harshly and severely rebuked defense counsel on numerous occasions during the trial. This course was necessary in view of the contumacious, boisterous, discourteous, and belligerent conduct of defense counsel, Dorsey K. Offutt.

The Court first attempted to check this abominable conduct by admonitions at bench conferences. This endeavor proved of no avail. If the Court had permitted defense counsel to persist without indicating its displeasure and without indicating to the jury that the Court made an effort to check these serious breaches of decorum, the Court, I think, would have unwittingly cast disrespect upon the administration of justice.

In this connection the remarks of a great jurist, Judge Learned Hand, of the Second Circuit, in the celebrated Communist case, *United States v. Dennis*, 183 Fed. 2d 201, are pertinent. In that case, too, defense counsel, as here, were guilty of serious misconduct throughout the trial, and as here, they were sentenced at the conclusion of the trial

to jail for contempt of Court, except that instead of being sentenced only for ten days, as was done in this instance, the trial judge in the *Dennis* case imposed sentences of several months' duration.

1884 Judge Learned Hand remarked that the question of misbehavior of counsel and the alleged misconduct of the Court cannot be entirely separated. Then he went on to say:

"The trial was punctuated over and over again with motions for a mistrial, often for patently frivolous reasons; by innuendo, and at times openly, the judge was charged with unfairness and 'judicial misconduct'—often in most insulting language."

And I say this was done here time and time again.

"Those occasions on which the defendants rely to show his intemperate hostility, so far as the record preserves what happened, are completely unconvincing. At times, it is true, he rebuked the attorneys; at times he used language short of requisite judicial gravity; at times he warned them that if they persisted in conducting themselves as they had been doing, he would punish them when the trial was over. (An entirely proper action, for to commit them pending the trial would have broken it up, and to be silent might well have misled them.) These cautions they answered most unwarrantably, as threats to prevent the discharge of their duties."

And again Judge Learned Hand states:

1885 "Justice can be as readily destroyed by the flaccidity of the judge as by his tyranny: impartial trials need a firm hand as much as a constant determination to give each one his due. The record discloses a judge, sorely tried for many months of turmoil, constantly provoked by useless bickering, exposed to offensive slights and insults, harried with interminable repetition, who, if at times he did not conduct himself with the imperturbability of a Rhadamanthus, showed considerably greater self-control and forbearance than it is given to most judges to possess."

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[fol. 263] IN THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 11,466

DORSEY K. OFFUTT, Appellant,

v.

UNITED STATES OF AMERICA

MINUTE ENTRY OF ARGUMENT AND SUBMISSION, DATED JUNE
24, 1953, OMITTED IN PRINTING

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11466

DORSEY K. OFFUTT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided November 19, 1953

Mr. Warren E. Magee, with whom *Miss Charlotte Maskey* was on the brief, for appellant.

Mr. William J. Peck, Assistant United States Attorney at time of argument, with whom *Messrs. Leo A. Rover*, United States Attorney, and *Arthur J. McLaughlin*, Assistant United States Attorney, were on the brief, for appellee. *Messrs. Charles M. Irelan*, United States Attorney, *Joseph M. Howard*, *William E. Kirk, Jr.*, and *William R. Glendon*, Assistant United States Attorneys, at time record was filed, entered appearances for appellee.

Before EDGERTON, BAZELON and FAHY, Circuit Judges.

PER CURIAM: On the trial of *Henry L. Peckham, Jr.*, under the abortion statute of the District of Columbia, *Dorsey K. Offutt, Esq.*, was defense counsel. At the end of the trial the presiding judge summarily found Offutt guilty of criminal contempt of court and ordered him committed for 10 days to the custody of the United States Marshal. Offutt appeals from that order.

We quote from the order:

"Pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure, I hereby certify that I saw and heard the contempts of court hereinafter described, and that they were committed by Dorsey K. Offutt in the actual presence of the court during the trial of a criminal proceeding before me entitled, *United States v. Henry L. Peckham, Jr.* . . .

"I find that said Offutt was guilty of the following breaches of decorum and offensive, contumacious, and unethical conduct in open court during the trial; and that said breaches and course of conduct constituted contempt of court. . . .

"1. On numerous occasions, he made insolent, insulting and offensive remarks to the court, and was guilty of gross discourtesy to the court. . . .

"2. On numerous occasions, he persisted in repeating questions, previously excluded by the court, in order to evade the court's rulings, in spite of admonitions by the court to the contrary. Many of these questions were obviously intended to besmirch a witness. . . .

"3. On numerous occasions he persisted in talking boisterously after the court had made a ruling, and failed to desist when ordered to do so by the court, at times even continuing to talk while the court was speaking. . . .

"4. On numerous occasions he used a boisterous, belligerent, discourteous and offensive tone of voice in addressing the court. . . .

"5. On several occasions, he made false statements to the court, which he could not help knowing to be untrue, particularly concerning what the court had done or said. . . .

"6. On several occasions he asked of witnesses questions that were highly prejudicial to the witness and for which there was no foundation. Thus, he asked Mary Ott, the victim of the abortions charged against the defendant, 'When were you arrested in this case?' As a matter of fact she never had been arrested and when called to account by the court, Offutt only answered that he had a right to enquire

whether the witness had been arrested in this case. . . .

"8. On numerous occasions, he created a noise and commotion in the courtroom by boisterous interruptions and irrelevant remarks, such as objecting to a quiet conversation between two spectators in the courtroom, one of whom had been a witness in the case. . . .

"11. He abused the process of the court by issuing a subpoena *duces tecum* to the mother of Mary Ott, and compelled her to come here from Erie, Pennsylvania, pursuant to a subpoena; and by issuing a subpoena to one Donohower. When called as witnesses, he was unable to elicit any relevant testimony from either of them.

"12. He constantly tried to create an episode that might lead the court to direct a mistrial. . . ."

Most of these findings are followed by several references to the record.

The record amply supports the quoted findings numbered 1, 2, 6, and 12¹ and the ultimate finding of contempt. But we think the record does not support the penalty imposed.² Appellant's conduct cannot fairly be considered apart from that of the trial judge. Each responded to great provocation from the other. The

¹Finding 1 makes findings 3, 4, and 8 credible, but we do not pass upon them since the record necessarily fails to show boisterousness, belligerent tones, etc. We think finding 5 lacks adequate support. The question of the correctness of the court's finding that appellant was in contempt of court in issuing the subpoenas referred to in finding 11 is not before us and we express no opinion on it, for he does not appear to have issued the subpoenas 'in the actual presence of the court' and therefore was not on their account summarily punishable by the presiding judge. Federal Rules of Criminal Procedure, Rules 42(a), 42(b). We have not considered findings 7, 9, and 10."

judge's treatment of appellant, examples of which are included in an appendix to our opinion in *Peckham v. United States*, decided today, and which is the chief factor in leading a majority of this court to conclude that Peckham's conviction cannot stand, leads us all to conclude that appellant's sentence should be reduced from 10 days to 48 hours. The order will be modified accordingly.

Modified and affirmed.

[fol. 268] IN THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 11,466

DORSEY K. OFFUTT, Appellant,

v.

UNITED STATES OF AMERICA

Appeal from the United States District Court for the
District of Columbia

Before Edgerton, Bazelon and Fahy, Circuit Judges

JUDGMENT—Filed November 19, 1953

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, modified by reducing appellant's sentence from 10 days to 48 hours and that said order, as thus modified, be, and it is hereby, affirmed.

Per Curiam.

[File endorsement omitted.]



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11487

HENRY L. PECKHAM, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided November 19, 1953

Mr. Albert J. Ahern, Jr., for appellant.

Mr. John D. Lane, Assistant United States Attorney, with whom *Messrs. Leo A. Rover*, United States Attorney, *Arthur J. McLaughlin*, Assistant United States Attorney, and *William J. Peck*, Assistant United States Attorney at the time of argument, were on the brief, for appellee. *Messrs. Charles M. Irelan*, United States Attorney, *Joseph M. Howard*, *William E. Kirk, Jr.*, and *William R. Glendon*, Assistant United States Attorneys, at the time the record was filed, also entered appearances for appellee.

Before EDGERTON, BAZELON and FAHY, Circuit Judges.

FAHY, *Circuit Judge*: Appellant was indicted in two counts under the abortion statute, D. C. Code § 22-201 (1951), 31 Stat. 1322.¹ The first count alleged the com-

¹ "Whoever, with intent to procure the miscarriage of any woman, prescribes or administers to her any medicine, drug, or substance whatever, or with like intent uses any instru-

mission of the offense in May 1951; the second the commission of a like offense in January 1952.² The same woman was involved in each instance. At a jury trial appellant was convicted on the first count and acquitted on the second. His appeal raises a number of questions.

First we consider whether the indictment was good though it omitted negative averments that defendant, a licensed and practicing physician, did not procure the miscarriages to preserve the woman's life or health. See definition of the crime, n. 1, *supra*. In *Williams v. United States*, 78 U.S. App. D.C. 147, 138 F. 2d 81, where the indictment contained the averments this court held it was unnecessary to prove them. We adhere to the ruling there made that the provisions of the statute which give rise to the problem are intended to furnish the defense an opportunity for justification and are no

ment or means, unless when necessary to preserve her life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned for not more than five years; or if the woman or her child dies in consequence of such act, by imprisonment for not less than three nor more than twenty years."

² The indictment reads as follows:

"The Grand Jury charges:

"On or about May 2, 1951, within the District of Columbia, Henry L. Peckham, Junior, with intent to procure the miscarriage of Mary M. Ott, otherwise known as Mary Lee Ott, who was then pregnant, used upon her an instrument and means of a kind unknown to the Grand Jury, and administered to her medicine, drug and substance of a kind unknown to the Grand Jury.

"SECOND COUNT:

"On or about January 18, 1952, within the District of Columbia, Henry L. Peckham, Junior, with intent to procure the miscarriage of Mary M. Ott, otherwise known as Mary Lee Ott, who was then pregnant, used upon her an instrument and means of a kind unknown to the Grand Jury, and administered to her medicine, drug and substance of a kind unknown to the Grand Jury."

part of the description of the offense required to be proved by the prosecution. Not being essential elements of the offense they may be omitted from the indictment as well as from the proof. See Rule 7(c), Fed. R. Crim. P.

Prior to trial the accused moved for return of certain articles he owned, asserted to have been unlawfully seized from his office, and for their suppression as evidence against him. See Rule 41(e), Fed. R. Crim. P. He claimed, *inter alia*, that the search warrant pursuant to which the articles were obtained had been issued without probable cause. In ordering return of some of the articles as agreed by the Government the court held open the question of probable cause pending location of an affidavit said to have been furnished by Mary Lee Ott as the basis in part for issuance of the warrant. Defense counsel asked for opportunity, if the affidavit were located, to see it before the court ruled. After it was found the court, without affording counsel an opportunity to make further objection, held the search warrant valid, inserting his ruling in the transcript at a place which had been left for that purpose.³ The defense filed a motion for reconsideration on several grounds, including

³ The insertion is as follows:

"The Court: Pursuant to statement to respective counsel, I obtained through the Clerk's office from the official files the original affidavit of Mary Lee Ott, which constituted part of the basis for the issuance of the search warrant in this case and caused it to be marked as an exhibit in the case and filed in the jacket.

"With this before the Court, I concluded that there was probable cause for issuance of the warrant.

"Upon discovery of this official record of the Court, counsel for the defendant Peckham, Mr. Offutt and Mr. Spriggs, were forthwith advised, and further instructed to prepare and present an order promptly, granting in part and denying in part the motion to suppress and ordering the return of such items."

the assertion that the Ott affidavit was not proved to have been executed prior to issuance of the warrant. The trial judge refused to pass upon the matter or to continue the trial so that it could be disposed of by the judge who had heard the motion to suppress.

We think defendant was and still is entitled to an opportunity to complete his attack upon the search warrant after the Ott affidavit had been located. The failure to afford such opportunity, however, is not itself ground for a new trial. Only if the hearing on the validity of the warrant should result in a ruling that it was not valid and accordingly that material evidence should have been suppressed would a new trial be required.* See *Coplon v. United States*, 89 U.S. App. D.C. 103, 114, 191 F. 2d 749, 760, *cert. denied*, 342 U.S. 926.

Prior to trial the defense moved that the Government be required to elect upon which of the two counts it would proceed. Since the offenses are of the same or similar character they were validly joined in the same indictment. It was not error therefore to overrule the motion when it was presented. Rule 8(a), Fed. R. Crim. P. See, also, Rule 13, and *Dunaway v. United States*, — U.S. App. D.C. —, 205 F. 2d 23. If thereafter "prejudice developed and was not cured by requiring an election or by other relief" material error would afflict the trial, *Dunaway v. United States*, *supra* at 24. But the accused was acquitted on one count and a new trial is granted as to the other. Accordingly the question of prejudice for failure to require an election is eliminated.

The principal witness against the accused was Mary Lee Ott, upon whom the abortions are alleged to have been procured. On her cross-examination it developed

* As hereinafter appears a new trial is granted for other reasons. The incompleted hearing on the search warrant may accordingly be concluded on the remand.

that in 1950 she had been a patient in the psychiatric ward of the United States Naval Hospital, Bethesda. While admitting that she had been in this ward she denied having received psychiatric treatment. The defense sought to show through an attache of the hospital, who had brought her records to court in response to a subpoena duces tecum, that she had undergone treatment at the hospital for mental trouble. The records as a whole extended back to December 1947 and the last entry was September 13, 1950. The court would not permit proof in this manner of actual psychiatric treatment, assuming the records would have shown it. Since the evidence was offered only on the question of Mrs. Ott's credibility as it might be affected by her mental condition at the time she testified, and twenty months had elapsed since the alleged treatment there was no abuse of discretion in excluding the evidence.⁵ See *State v. Hayward*, 62 Minn. 474, 496, 65 N.W. 63, 70; *Ellarson v. Ellarson*, 198 App. Div. 103, 190 N.Y. Supp. 6 (3d Dept.).

In January 1952 shortly after the second abortion was said by the complaining witness to have occurred, she entered Mt. Alto Hospital in Washington. A doctor who examined her there testified that in his opinion she had peritonitis secondary to an induced abortion. In so testifying he refreshed his recollection from hospital records. On cross-examination he said he did not rely entirely upon these records, that in treating the patient he studied her entire chart in considerable detail. The court permitted defense counsel to see only those portions of the

⁵ There is some indication that the evidence was desired not entirely in connection with the witness' credibility but also to probe her competency to testify at all; but the record as a whole we think does not bear out this suggestion. In any event, if the effort was to undermine the witness' competency it came too late. *State v. Whitsett*, 232 Mo. 511, 526, 134 S.W. 555, 560, and, further, was inadequate for that purpose. *People v. Harrison*, 18 Cal. App. 288, 296, 123 Pac. 200, 203.

records which the witness used to refresh his recollection. These included, however, entries that in 1947 there had been an abortion at six weeks, in 1948 "a term still birth", and in 1949 "full term living child", also entries regarding the patient's recent medication of herself and her denial of instrumentation. All of this was disclosed to the jury but the defense was not permitted to see the whole file, the court considering it confidential.

It is contended that the doctor in giving his opinion as to an induced abortion should have been subject to fuller cross-examination on the basis of all records which had been available to him. But his opinion related only to the second count, of which the accused was acquitted. Obviously this removes the basis for claiming error as to the first count, which is all that is before us.

The accused took the stand in his own defense. In cross-examining him the prosecution sought to elicit his conversations with his own attorney, to show that he and his attorney had intended to claim falsely that he had not seen the prosecuting witness at all in May 1951. As the trial proceeded, however, defendant actually testified he saw her twice early in May, though not on May 7th as she said and when in fact he was a patient in a hospital. On objection by the defense the attempted cross-examination about conversations of defendant with his attorney was not permitted. The prosecution then asked defendant if he had heard his counsel in his opening statement say the defendant never saw the complaining witness until January 9, 1952. Defendant was permitted to answer and denied having so heard. The prosecution argued to the jury that this testimony conflicted with counsel's opening statement, erroneously attributing to the latter the following: "I will prove that the first time this defendant ever saw this girl was on May the 9th" (no doubt intended by the prosecutor as January 9). After the jury retired they requested that defense counsel's open-

ing statement in this regard be read to them. This was done over defense objection.

We see no error growing out of these incidents. If the jury had been led to believe defense counsel had said in his opening statement the accused had never seen the prosecuting witness until January 1952, its actual content read to the jury disabused them, for it showed this had not been said. There is no reason to suppose the jury were misled in interpreting the factors involved, namely, what was contained in the opening statement, the actual testimony defendant gave as to seeing Mrs. Ott in May 1951, Mrs. Ott's own testimony, and the questions and arguments of counsel. And we perceive no error in permitting defendant to be asked, and to answer, what he heard his counsel say to the jury. It is true, as appellant points out, the opening statement was not evidence; but it was an occurrence in the presence of defendant and to permit him to be questioned about it was not to treat it as evidence.

There was testimony by an officer that at police headquarters after the arrest he talked with defendant regarding an abortion upon Mrs. Ott and he responded, "No answer", "No statement". On the stand defendant was cross-examined closely about this in the effort to lead the jury to believe he would have denied guilt if he were innocent. No point is made on appeal as to possible error in the original admission of the "No statement" evidence through the officer.⁶ The contention now is that prejudice resulted in permitting defendant to be cross-

⁶ While at first the court refused to permit the defendant to explain why he made no statement, in the end the defense was permitted to suggest that he wanted to consult counsel: "Now, Mr. Sullivan [the officer], isn't it a fact that Dr. Peckham told you he wasn't answering any questions until you let him call his lawyer? The Court: You may answer. The Witness: No, sir." The testimony then goes into his efforts to obtain a lawyer.

examined as to why he would make no statement to the officer. If it is thought that he was insulated from cross-examination in this regard because of the Fifth Amendment's protection against self-incrimination the point is disposed of by *Raffel v. United States*, 271 U.S. 494. It was there held that when a defendant takes the stand in his own defense he may be cross-examined about his failure to testify on his previous trial for the same offense. This court has similarly ruled in *Viereck v. United States*, 78 U.S. App. D.C. 279, 139 F. 2d 847, cert. denied, 321 U.S. 794. Implicit in these decisions is the right to cross-examine a defendant about his failure to seek to exonerate himself when questioned on a previous occasion, for if such cross-examination does not invade the protection of the Fifth Amendment in the circumstances presented in the *Raffel* and *Viereck* cases it does not invade its protection here. And we know of no other basis for excluding the cross-examination, assuming, as we do, that the "No statement" evidence was properly admitted; for even if the accused could validly refuse to make a statement nevertheless when he took the stand he could be asked why he refused.⁷

We take up now the court's charge and certain requests of defendant for instructions. The witness Christenson according to his own testimony had assisted in

⁷ It is not suggested that the cross-examination was beyond the scope of the direct. We add that from our examination of the record it seems clear such a point would not be valid.

Our disposition of the "No statement" problem disposes of the further contention that it was improper for the prosecuting attorney to argue to the jury that the refusal indicated guilt. During his cross-examination the accused sought to justify his refusal on constitutional grounds. The loss of protection on that score which resulted from his taking the stand carried with it the loss of protection from use of the incident in the prosecution's summation provided the discussion of the point was otherwise fair, a matter referred to *infra*. See para. 11, Appendix, *infra*.

arranging and furthering the first alleged abortion. The court instructed the jury he must be deemed an accomplice and that his testimony should be received with care and scrutinized with caution. Though not in the exact form sought by defendant this adequately covered his request; and the fact that the judge interpolated that he was required by law to give the instruction did not, as appellant contends, vitiate it.*

Appellant urges error in the court's refusal of the substance of a requested instruction that Mary Lee Ott while not an accomplice strictly speaking was morally implicated and the jury should consider this as bearing upon her credibility. *Thompson v. United States*, 30 App. D.C. 352, 362-64, is authority for such an instruction but does not hold that it must be given whenever requested. While we think the instruction should have been given its omission would not itself require a new trial. The jury acquitted appellant on the second count notwithstanding very damaging testimony by Mary Lee Ott. On that count she was not corroborated as fully as with respect to the first. The difference in verdicts indicates the jury gave discerning consideration to her truthfulness notwithstanding the omission of this particular instruction.

It is complained the court failed to define all the essential elements of the crime. It is said no instruction was given as to the necessity of proof beyond a reasonable

* Appellant also complains that the form of the instruction given on the care with which the testimony of Christenson should be viewed told the jury that Christenson was an accomplice and thus carried the inference that defendant was guilty. The language of the charge, however, is not different in substance from that requested by the accused, as follows:

"The jury are instructed that the witness Christenson is an accomplice as a matter of law and as such they should view his testimony with suspicion and they look to corroboration."

We think the jury understood that they must find the facts.

doubt that the complaining witness was pregnant and appellant did some act or administered some treatment or drug with intent to procure an abortion. But the court did in fact require the Government to establish that defendant prescribed or administered a medicine, drug, or other substance, or used on the woman some instrument or means, that she was pregnant at the time, and that defendant did the act with intent to procure a miscarriage. There was also an adequate instruction on the necessity of finding guilt beyond a reasonable doubt.

Finally as to the charge,* it is urged a disproportionate amount of it was devoted to outlining the Government's side of the case. But this occurred primarily in connection with the second count as to which the defense won an acquittal. As to the first count the fact is the defense consisted almost entirely of the case as outlined in the charge, namely, defendant's denial that he performed the abortion, together with evidence as to his entering George Washington Hospital as a patient, where he remained all of May 7th and for several days thereafter (though, as the court continued, he admitted on cross-examination that the prosecuting witness was in his office twice during the first week of May) and his denials that he went to a hotel to see her as she had testified, or received a phone call from her from there or had any conversations with Christenson, her companion, concerning any abortion, as to all of which Mrs. Ott and Mr. Christenson had testified. Counsel do not suggest what

* We are aware that appellant also complains of the omission to give instructions that counsel had a right to object to certain gestures and gesticulations of the trial judge, and that the jury should disregard any intonations and gestures the judge exhibited and his statement that defense counsel's statement the prosecution was not brought in good faith was improper. We treat *infra* the defense's claim of error in the judge's general conduct, and these matters are not likely to recur upon a retrial.

more the court should have said.¹⁰ Here again we would not be warranted in finding prejudicial error.

After the jury retired it appears the judge received a message they desired certain record cards of defendant which had been marked as exhibits. The court let these cards go to the jury without the prior knowledge of defense counsel. Parts of their contents had been admitted in evidence, but some notations on them had not.¹¹ The cards were pertinent on the question of defendant's truthfulness in testifying that certain named patients had come to his office the afternoon Mary Lee Ott said the second alleged abortion was committed, January 18, 1952. The notations not admitted in evidence indicated the treatment given these persons. Permitting the exhibits to go to the jury in their entirety when their full contents were not in evidence illustrates the danger of acting in the absence of counsel. But the incident, no doubt inadvertent, need not be elaborated upon since it is quite unlikely to recur. We add that the full contents of the cards show nothing significant which had not already been brought to light on cross-examination of defendant.

The defense objected without avail to the question of the prosecuting attorney, in cross-examining defendant, whether during the month of May 1951, his entire practice consisted of performing abortions. Defendant answered in the negative. In the context of the whole evi-

¹⁰ The full statement in counsel's main brief on this point is: "We call the Court's attention also to the fact that the charge was inherently prejudicial in that the court devoted 9/10 of the charge to the Government's side of the case, and 1/10 to appellant's version."

¹¹ As to the admission in evidence of some of the contents of the cards we find no error. They had been used by defendant in making notes. He used the notes to refresh his recollection while testifying. He was cross-examined as to the accuracy of these notes, on the basis of what the cards themselves showed inconsistent with the notes.

dence, which developed the practice in which defendant was engaged, not limited to abortions, the question, answered as it was, was not prejudicially unfair. The prosecution did not attempt independently to prove other offenses than those on trial. The court, however, in overruling a defense objection to a similar question, that is, whether he specialized in abortions during January 1952, as to which the defense claimed there was no proof, commented that the prosecution had introduced plenty of proof, adding "but it is for the jury". Since there was an acquittal on the second count to which the question related, and because of the court's statement that it was for the jury, his reference to the proof did not constitute prejudicial error, though it should have been avoided.

Appellant contends the court erroneously excluded objections to the manner in which the charge was given, within the rule of *Billeci v. United States*, 87 U.S. App. D.C. 274, 281-82, 184 F. 2d 394, 401-02, and *Butler v. United States*, 88 U.S. App. D.C. 140, 188 F. 2d 24. The contention is amplified by the argument that at a bench conference after charging the jury the court would not permit counsel to enter an objection. The transcript shows, however, that this frustrated effort was to enlarge an objection already made that the court's summation of the evidence was not fair to the accused, and was not directed to the manner in which the court delivered the charge. Appellant claims he was also denied at other times opportunity to object to gesticulations and other allegedly unseemly conduct of the judge toward defense counsel: but the conduct objected to, and the objections themselves, are not within the *Billeci* and *Butler* cases. These cases involve the problem of a judge weighting or slanting his views by gestures or intonations. Here the conduct objected to was the judge's manner of ruling, and his attempts to control counsel, in respects which did not include a slanting of his attitude inconsistent with the content of the cold record. Hostility to counsel was at times

displayed by the court, but this presents a question not considered in the cases cited.

Prejudicial error is asserted as the result of rejections by the court of certain proffers of evidence made by the defense during cross-examination of Government witnesses. The court was mistaken in basing his rejections upon the theory that during the cross-examination of an adverse witness proffers are never in order. When the examination is direct a proffer, though usual, is not invariably required to obtain review of exclusion of a question, see Rule 43(c), Fed. R. Civ. P.; but neither is a proffer invariably inappropriate when the examination is cross and objection to a question is sustained. There is a discretion, which was not abused, and we may not assume it will be abused in the event of a retrial.¹²

A number of other questions are presented generally. These include claims of degrading and belittling remarks directed at defense counsel by the judge, restrictions upon cross-examination, the judge's assumption of the function of an advocate, lack of impartiality,¹³ and prejudicial remarks by the prosecutor. As to the effect of these matters on the fundamental fairness of the trial this court finds itself divided. Judge Edgerton and Judge Bazelon, constituting a majority of the court, are convinced that the excessive injection of the trial judge into the examination of witnesses, his numerous comments to defense counsel, indicating at times hostility, though under provocation, demonstrated a bias and lack of impartiality which may well have influenced the jury;¹⁴

¹² In overruling the motion for a new trial the judge himself pointed out that he had a discretion in this matter.

¹³ The statement of the court to the jury, after they had returned their verdict, indicating his strong feelings as to the guilt of defendant does not show error in the conduct of the trial itself.

¹⁴ Throughout the fourteen day trial there were numerous clashes between defense counsel, on the one hand, and court

that, considering these matters and others,¹⁵ examples of which are set forth in an Appendix attached hereto, this court is barred from sustaining the judgment as the product of a fair and impartial trial. This necessitates reversal.

The writer of this opinion feels decidedly that it would have been preferable for the court to have restrained his interruption of the examining process. The Government was well represented and the extent of the judge's participation was not required by his obligation to maintain a firm and salutary control of the proceedings. We have today in No. 11466, *Offutt v. United States*, sustained the contempt conviction of defense counsel due to his conduct in this case but we have reduced the sentence. By sustaining the conviction we have expressed our conclusion that counsel was contemptuous, while in reducing the sentence we have reflected our view that his conduct was not altogether separable from that of the judge in treading the area reserved for counsel, thus creating conflict and engendering remarks and attitudes on the part of both court and counsel which afflicted the trial. The writer is persuaded in the end, however, not to join in reversal of the conviction of Peckham. His acquittal on the second count goes far to show that the jury were not misled. Had he been convicted on both counts the writer too would agree a new trial would be necessary,

and prosecutor, on the other. Although defense counsel never requested the court to admonish the jury that these unfortunate incidents were not to be taken against appellant, the majority believes that minimal precautions required such admonition either at the time they occurred or in the charge to the jury. See, for example, *United States v. Dennis*, 183 F. 2d 201, 225 (2d Cir.), *affirmed*, 341 U. S. 494; and *Mansfield v. United States*, 76 F. 2d 224, 232 (8th Cir.), *cert. denied*, 296 U.S. 601, where such instructions were given.

¹⁵ Including some of those which we have previously discussed and which the majority concede would not, standing alone, amount to prejudicial error.

for the guide of the different verdicts by which to judge the effect on the jury would not have been available. He is fortified in his conclusion by the fact that the case under the first count, on which defendant was convicted, was strong, and yet the complaining witness blamed the accused equally with respect to the second count, as to which she was not so well corroborated. The distinction drawn by the jury indicates an impartial consideration of the evidence. The writer adds that the defense was fully presented from an evidentiary standpoint, there was full enough cross-examination of all Government witnesses, the relevant aspects of their characters and lives, as of all other witnesses, were brought to light before the jury, and the jury were adequately instructed. He realizes it can be argued that except for defects in the trial which lead the majority to reverse the defendant might have been acquitted also on the first count. But the imponderables involved in judging the effect of these defects, as distinct from specific rulings or actions which we have separately considered and find in no instance to constitute prejudicial error, call for an appraisal based upon the entire trial, including its result. The writer concludes the jury were not led away from a fair and impartial consideration of the case, and would affirm.¹⁶ The majority believes that, in the light of the disorderly atmosphere of the trial, it would require too great a degree of speculation to say that the appellant was fairly tried on the issues relevant to the first count.¹⁷ We are all

¹⁶ * * * The harmless-error statutes [see Rule 52(a), Fed. R. Crim. P.] have been adopted to give discretion to overlook errors which cannot be seen to do injustice." *Stein v. New York*, 346 U.S. 156, 193. Though the Supreme Court divided in this case the dissent is not due to disagreement with this statement.

¹⁷ The majority cites *Krulewitch v. United States*, 336 U.S. 440, 444-45; *Kotteakos v. United States*, 328 U.S. 750, 764-65; and *Bollenbach v. United States*, 326 U.S. 607, 614-15.

agreed that the misconduct of appellant's counsel which helped produce such atmosphere is for the contempt proceedings against counsel, and scrupulous care must be taken not to weigh such misconduct against appellant.

The judgment will be reversed. On the remand a further hearing upon the motion to suppress should be granted if requested.

It is so ordered.

Appendix

These excerpts from the record are examples of the matters referred to at pages 13 and 14 of the opinion, *supra*:

1. "[Mr. Offutt]: You said that George objected to it. When did he object to it? Give us the date.

"Mr. McLaughlin: Now, he is right back again, Your Honor.

"Mr. Offutt: I don't want the conversation.

"The Court: Now, Mr. Offutt—

"Mr. Offutt: I misunderstood Your Honor's ruling.

"The Court: No, I think you understood.

"Mr. Offutt: I did not, I give you my word of honor.

"The Court: You can't be as stupid as all that. Do not transgress my ruling again." Pp. 253-54.

2. "Mr. Offutt: That she had tried to induce the doctors in the Naval Medical Center, in 1950, to perform an abortion on her?

"Mr. McLaughlin: 1950?

"The Court: 1950, I think that is an outrageous question to ask.

"Mr. McLaughlin: He is in contempt of court, Your Honor.

"The Court: It has nothing to do with the issue of this case.

"I think a witness—I am not referring to this witness—but I think a witness is entitled to some protection and I don't think such questions should be asked about.

"Mr. McLaughlin: And I think my friend is in contempt of court, Your Honor, because the question asked this witness is pertaining to this abortion in January, whether or not he told Mr. Offutt that this

girl performed or attempted to perform this abortion by inserting the glass tube.

"My friend knew what we were talking about and I say in reference to this incident that his imagination is running away from him; he is in contempt of court in asking the question.

"The Court: I think the question is highly improper, and your point is well taken, Mr. McLaughlin." Pp. 620-21.

3. "Mr. Offutt: I move Your Honor to admonish Mr. McLaughlin.

"The Court: I don't think you are a person to object to interruptions. You may proceed.

"Mr. Offutt: I object to that statement, Your Honor.

"The Court: You may do so and your objection is noted on the record." P. 661.

4. "[Mr. Offutt]: . . . I move for a mistrial and I say to Your Honor I object to Your Honor and the District Attorney, he has raised his voice too—right now.

"The Court: Go back to counsel table.

"Mr. Offutt: And I object, Your Honor.

"The Court: Go back to the counsel table or I will have the Marshal put you there." P. 941.

5. "The Court: You may go back to counsel table and proceed with the examination of the witness.

"Mr. Offutt: May I have an objection?

"The Court: Go back to counsel table.

"Mr. McLaughlin: May I say that the defense attorney—

"The Court: Go back to counsel table.

"Mr. Offutt: I object to your putting your hand up like that—

"The Court: Go back to counsel table. Stop, or I

will have the Marshal pull you back to your seat."
P. 1081.

- 6 "Mr. Offutt: If the Court please, I respectfully move Your Honor for a mistrial and—

"The Court: Motion denied.

"Mr. Offutt (Continuing): —and I want to put the proffer on the record at this time—

"The Court: Motion denied.

"Mr. Offutt: And I want the record to show that Your Honor raised your hand—

"The Court: Motion denied.

"Mr. Offutt (Continuing) —and ordered me back from the bench.

"The Court: Motion denied. Proceed.

"Mr. Offutt: I object to Your Honor yelling at me and raising your voice like that.

"The Court: Just a moment. If you say another word I will have the Marshal stick a gag in your mouth." P. 1082.

7. The comment of the judge already referred to in the opinion, p. 12, *supra*, regarding the Government having "introduced plenty of proof" of abortions in January 1952. P. 1551.

8. The following incident occurred during the summation of Mr. McLaughlin, the prosecuting attorney, to the jury:

"[Mr. McLaughlin]: Not sure, eh? He is the one who was associating and contacting himself with those people; so that if he says they are unworthy of belief, what is he doing with them? What is he associating and performing abortions for? Besides, you know without him, naturally they could not be aborted, and it is like the criminal without the criminal lawyer; he cannot be successful. * * *

"Mr. Offutt: I object to that, if your Honor please. I object to that argument. * * * That re-

flects upon every lawyer that represents a man charged with a crime, and I say that is highly improper. . . .

"The Court: It does not reflect on every lawyer.

"Mr. Offutt: Well, it does reflect in this case—well, I move for a mistrial, and ask for an exception, your Honor." Pp. 1740-41.

9. The following incident occurred during the summation of Mr. Offutt, the defense attorney, to the jury:

2[Mr. Offutt]: Now, Mr. McLaughlin does something which I don't do, and which anyone couldn't do, because the law protects the juvenile: he injects into this trial, by his own question, he asked Mrs. Steerman, the landlady, didn't Mr. Offutt tell you that Mrs. Ott had been a prostitute—just think of it—since—

"The Court (Interposing): Now, just a moment. Mr. McLaughlin never made any such statement, and there is no warrant for it in the record.

"What Mr. McLaughlin did was to ask a question as to whether you made that statement.

"Mr. Offutt: Well, that's what I just said.

"The Court: You said Mr. McLaughlin made the statement.

"Mr. Offutt: I said Mr. McLaughlin brought it in by asking Mrs. Steerman if I didn't tell her that.

"I will read it from the record.

"The Court: That's right, but—

"Mr. Offutt (Interposing): That's exactly what I said.

"The Court: You didn't state the matter accurately.

"You may proceed. I think you ought to stick to the record accurately.

"You may proceed." Pp. 1808-09.

10. The record reveals that over five pages of the transcript are devoted to the trial court's summation of the Government's evidence, as opposed to four paragraphs for appellant's defense. Pp. 1847-53.

11. In argument to the jury, the prosecutor referred to the defendant's invocation of his constitutional right not to answer questions at the time he was arrested, saying: "That seems to be a cute phrase nowadays, and if it is a pet phrase, ladies and gentlemen of the jury, consider the type of individual who uses it or says it." P. 1749. Then, again referring to the same matter, the prosecutor said: "Why, that is not natural and it is not logical, because we know when we hear of it, and especially today, those who stand on their constitutional rights have something to hide, one way or the other." P. 1750.

12. The following is a part of the prosecuting attorney's argument to the jury:

"[Mr. McLaughlin]: And I thought, as I listened to him testify, ladies and gentlemen, what if your sister or your mother happened to be in that neighborhood, and on the spur of the moment, in a fainting spell, or something, you required a doctor and walked in there, not knowing who he was or what he was, but merely seeing the doctor's sign on the door, and becoming suddenly ill or sick, you go down in that basement with this defendant. And especially you hearing now as to how he operates, and you go home at night and say, 'I wonder what he did with my wife. I wonder what he did with my daughter when he had her down there, with not a soul in hearing distance, or anyone to come to her aid if anything did happen.'

"I don't know. I don't know whether it is the law, or what it is, but it seems to me that at least it must

be a standard practice that when a doctor specially treats women, or has women clientele, that he should have at least a nurse around there.

"He should have a woman of some kind around there when he treats them, and especially if the treatment requires disrobing of that woman." Pp. 1754-55.

PETITION FOR REHEARING

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

No. 11,466

FILED DEC 4 1953

Joseph D. Stewart
CLERK

DORSEY K. OFFUTT, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

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Attorneys for Petitioner-Appellant.

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,466

DORSEY K. OFFUTT, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

PETITION FOR REHEARING

*To the Honorable, Circuit Judges Edgerton, Bazelon
and Fahy of this Court:*

Petitioner, Dorsey K. Offutt, appellant in the above-entitled appeal, respectfully prays that a rehearing be granted on his appeal, that his appeal be reconsidered, that the decision and judgment of this Honorable Court entered on November 19, 1953 be reviewed and modified.

JURISDICTION

Rule 26 of the Rules of this Court, as amended, provides for the filing of Petitions for Rehearing on appeals to this Court. This Petition is timely filed under that Rule.

BRIEF STATEMENT OF GROUNDS**I.**

Grounds exist which petitioner asserts justify further modification of the decision and judgment of this Court of November 19, 1953 and of the summary judgment of contempt entered below.

In its decision of November 19, 1953, this Court pointed out (page 1) that "at the end of the trial below the presiding judge summarily found Offutt guilty of contempt of court and ordered him committed for 10 days." This commitment was based upon a finding of guilt summarily made without a hearing by the judge below. Twelve findings were entered by the trial judge in support of his sentence of imprisonment.

This Court in its decision of November 19, 1953 upheld only four of the findings of the judge below, being findings numbered 1, 2, 6 and 12. In footnote 1 of its opinion (page 3) this Court made the statement that finding 11 could not be dealt with summarily and, therefore, was not punishable under Rule 42(a) of the Federal Rules of Criminal Procedure because the alleged contempt did not occur "in the actual presence of the court." As we read this Court's opinion, it has now been determined that the judge below could not proceed summarily concerning finding 11, which means that he lacked jurisdiction to enter this finding dealing with the purported wrongful issuance of two subpoenas to two witnesses in a criminal case. Rule 42(b) of the Federal Rules of Criminal Procedure requires that, before appellant can be adjudged in contempt of court for contempts not occurring in the presence of the court, he is entitled to written charges and to a trial on the merits before another judge. At the hearing of such charges evidence, of course, is admissible on behalf of appellant to meet the charge and in mitigation of it. In these circumstances, we respectfully submit that it is "casual" and

"obiter" for this Court to state as it did in footnote 1 that "appellant was in contempt of court" under finding 11.

United States v. American Medical Ass'n., 72 App. D. C. 12, 18; 110 F. 2d 703.

As appellant is entitled to a hearing of this charge, we do not think that a pre-judgment of contempt should be issued before his evidence is in. The reason being that this Court's finding is necessarily based upon an incomplete record and, if permitted to stand, would be a denial of due process of law, because based upon such an incomplete and improper record.

Ohio Bell Tel. Co. v. Comm'n., 301 U. S. 202.

Accordingly, we respectfully suggest that the finding of guilt contained in footnote 1 concerning finding 11 of the judge below should be reconsidered and should be deleted from this Court's decision as "not responsive" or necessary to the final decision reached by this Court.

United States v. American Medical Ass'n., *supra*, p. 18.

The trial judge as shown by the record below (J.A. 257, last paragraph) referred all twelve charges to the court below to be used as a basis for the disbarment or suspension of the appellant. Proceedings based on these charges are now pending in the court below seeking disbarment or suspension. It is of vital importance that "casual" and "obiter" comments concerning any charge, particularly charges which have been reversed by this Court, do not appear in this Court's decision as such casual statements can prejudice the defense of the appellant to the charges below.

II.

In its decision of November 19, 1953, this Court after reversing the findings of the judge below with respect to

findings 3, 4, 5, 7, 8, 9, 10 and 11 held (page 3) that "the record does not support the penalty imposed" because "appellant's conduct cannot fairly be considered apart from that of the trial judge." The reasoning of this Court was that among other things, appellant suffered "great provocation" from the trial judge. Accordingly, this Court finally concluded (Opinion, pp. 3, 4):

The judge's treatment of appellant, examples of which are included in an appendix to our opinion in *Peckham v. United States*, decided today, and which is the chief factor in leading a majority of this court to conclude that Peckham's conviction cannot stand, leads us all to conclude that appellant's sentence should be reduced from 10 days to 48 hours.

The reduction of sentence from 10 days to 48 hours, this Court properly decided was authorized by *United States v. United Mine Workers of America*, 330 U. S. 258, 304; *Rosenfeld v. United States*, 167 F. 2d 222, 223 (4 Cir.). It follows that this Court has authority to further alter, change, modify or reduce the summary judgment entered by the judge below. We respectfully submit that the judgment should be further modified for several reasons.

This Court in its opinion of November 19, 1953 stated that examples of the judge's treatment of appellant were shown by its opinion and appendix in *Peckham v. United States*, decided the same day by this Court, being No. 11,487. In reviewing the actions of the judge below in the opinion of this Court in the *Peckham* case, this Honorable Court held (Opinion, pp. 13-14):

A number of other questions are presented generally. These include claims of degrading and belittling remarks directed at defense counsel by the judge, restrictions upon cross-examination, the judge's assumption of the function of an advocate, lack of impartiality, and prejudicial remarks by the prosecutor. As to the effect of these matters on the fundamental fairness of the trial this court finds itself divided.

Judge Edgerton and Judge Bazelon, constituting a majority of the court, are convinced that the excessive injection of the trial judge into the examination of witnesses, his numerous comments to defense counsel, indicating at times hostility, though under provocation, demonstrated a bias and lack of impartiality which may well have influenced the jury; that, considering these matters and others, examples of which are set forth in an Appendix attached hereto, this court is barred from sustaining the judgment as the product of a fair and impartial trial. This necessitates reversal.

The writer of this opinion feels decidedly that it would have been preferable for the court to have restrained his interruption of the examining process. The Government was well represented and the extent of the judge's participation was not required by his obligation to maintain a firm and salutary control of the proceedings. We have today in No. 11466, *Offutt v. United States*, sustained the contempt conviction of defense counsel due to his conduct in this case but we have reduced the sentence. By sustaining the conviction we have expressed our conclusion that counsel was contemptuous, while in reducing the sentence we have reflected our view that his conduct was not altogether separable from that of the judge in treading the area reserved for counsel, thus creating conflict and engendering remarks and attitudes on the part of both court and counsel which afflicted the trial.

As we read the language of this Court in the *Peckham* case in the light of the examples set forth in the appendix of that opinion (Opinion pp. 17-22), this Court has concluded that appellant was subjected to "great provocation" coming from the trial judge (Offutt Opinion, p. 3), that "degrading and belittling remarks" (were) "directed at defense counsel" by the trial judge, that the trial judge assumed "the function of an advocate" and displayed "lack of impartiality." The majority of this Court in reversing the *Peckham* case, concluded that because of these actions of the trial judge and his "excessive injection . . . into the

examination of witnesses, his numerous comments to defense counsel, indicating at times hostility . . . demonstrated a bias and lack of impartiality . . .," a fair and impartial trial was denied Dr. Peckham. This Court further concluded (Offutt Opinion, p. 4) that this "treatment of appellant" by the judge below is the "chief factor" in leading the majority of this Court to conclude that the conviction below could not stand and all that appellant's sentence should be reduced from 10 days to 48 hours.

This Court said as appellant in some instances provoked the judge below, and ultimately this Court stated was guilty of contempt, he should be sentenced to imprisonment for 48 hours. We think in a situation where it has been found on appeal that the judge below was guilty of "provocation," "hostility," "bias," and "lack of impartiality," thereby depriving appellant's client of a fair and impartial trial and invaded "the area reserved to counsel" thus "creating conflict," that the principles involved in *Cooke v. United States*, 267 U. S. 517, 69 L. Ed. 767; *Whitaker v. McLean*, 73 U. S. App. D. C. 259, 118 F. 2d 596 and *Tumey v. Ohio*, 273 U. S. 510, 47 S. Ct. 437, 71 L. Ed. 749, should be applied and the summary judgment of contempt entered below under such circumstances should be reversed in its entirety.

As this Court has found that the judge below became personally involved in the so-called contempt citations which developed at the trial, the provisions of Rule 42(b) should have been applied. Summary proceedings should not have been indulged in and should not have been upheld by this Honorable Court. The existence of the power to punish summarily for contempt does not mean that it is always appropriate to use it. Certainly the summary power should never be used where the trial judge is personally involved, shows hostility and bias and invades the area reserved to counsel and in such fashion as to render a trial unfair. The employment of summary power to adjudge a lawyer in contempt seems inherently to involve

the basic thought that the judge exercising such arbitrary power should be free from fault and should be precisely correct in his conduct. After all, the judge and the lawyer are both officers of the court.

Mr. Justice Jackson in his decision in *Sacher v. United States*, 343 U. S. 1, 8, points out that, where there is strife in the trial of a contested criminal case, the supervision and control over counsel must be exercised "by a neutral judge." In the *Sacher* case, Mr. Justice Jackson made the position of the Supreme Court clear that where the vigorous defense of counsel brings that counsel in conflict with the trial judge, and where that right is infringed by the trial judge, counsel will be protected. Thus, Mr. Justice Jackson in the *Sacher* case held (p. 9):

Of course, it is the right of counsel for every litigant to press his claim, even if it appears far-fetched and untenable, to obtain the court's considered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts.

and (p. 13):

But that there may be no misunderstanding, we make clear that this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever.

It seems to us that the conflict below arose because of certain philosophies held by the trial judge on how courtroom procedures should be expedited. In a recent address delivered on April 6, 1953 before the Philadelphia Regional Chapter of the American Society for Public Administration, University of Pennsylvania (Vol. 14 F. R. D., pp. 323-330), the trial judge opened his speech with a statement concerning the fact that "the legal profession is now conscious of its own frailties," and quoted the lines of

Gilbert spoken by the Lord Chancellor in "Iolanthe," (p. 323):

The Law is the true embodiment
Of everything that's excellent.
It has no kind of fault or flaw
And I, my Lords, embody the Law.

The trial judge then proceeded to urge streamlining of cases for trial and stated that prospective jurors should be examined on the voir dire "by the judge alone" and said that the judge himself can select a jury in a criminal case in an hour or less and in routine civil or criminal cases in less than ten minutes and rarely more than twenty minutes. Then the judge below stated his own philosophy of expediting trials in the following language:

Other means of expediting a trial involve the constant and continuous exercise of firm control by the judge. Too often, in State courts particularly, he is regarded as a mere moderator or chairman. This is not the wholesome common law concept. The judge should participate in the trial and regulate its course. He should not permit it to leave its proper channel. He has the right to exclude of his own motion all immaterial and irrelevant evidence and confine the trial to the issues to be determined.

Further, the judge below stated (p. 327) "the court is clothed with power * * to curb" counsel's interrogation of witnesses and contended that prolonged examination causes departures, tangents and side issues which distract the jury.

It is respectfully submitted that the record below indicates that the application of these principles, held by the judge below, to some extent caused the judge below to tread into the area reserved for counsel as found by this Court in the *Peckham* case (*Peckham Opinion*, p. 14). This philosophy of the trial judge seems contrary to that expressed by the author of the *Sacher* opinion, Associate Justice Robert H. Jackson of the Supreme Court of the United States. In his address of November 2, 1953, at the American Bar

Center Cornerstone Ceremony in Chicago, Mr. Justice Jackson pointed out that lawyers "are among the most respected and articulate leaders in every field of thought and action." Continuing, Mr. Justice Jackson said:

The special competence and responsibility of the bar is in the administration of justice under law, because the private law office is the very cornerstone of that system.

and further:

• • there are occasions when the lawyer will be false to his client and to his profession if he is not ready to risk his own standing on a hard and perhaps unpromising contest. Rights, whether given by Constitution, statute or common law, are but scraps of paper unless a lawyer will go into the courtroom and there give concrete effect to the abstract word. Von Jhering goes so far as to say, "All the law in the world has been obtained by strife." And he adds that "Every legal right—the legal rights of a whole nation as well as those of individuals—supposes a continual readiness to assert and defend it." Thus the bar has a considerable part in lawmaking, and the prestige and authority of law as a social force at any time is very much what the lawyers make it.

While all lawyers will agree that proper respect is due the bench, we do submit that Mr. Justice Jackson's warning in the *Sacher* case should be borne in mind and that is that both judges and lawyers are human and both are heirs to all the weaknesses of the human flesh. While the dignity of the bench should be upheld, in the situation presented here, if this Court feels that some punishment should be inflicted because of appellant's conduct, as this Court has held that conduct cannot be considered apart from the conduct of the judge below, the ends of justice would be served if the sentence were reduced to a fine, or should be suspended, if it cannot be set aside in toto. We even feel that the respect due the judiciary could be upheld by the lan-

guage of this Court's opinion, with appropriate admonitions to appellant, rather than the imposition of a fine or imprisonment. Such a modified sentence certainly would serve the best interests of justice and give to trial attorneys that protection to which they are entitled when a trial judge invades the field reserved to attorneys, particularly in the defense of a heated, highly controversial and vigorously contested criminal case. Our suggestions for modification, we feel, are in keeping with the admonitions of Mr. Justice Jackson in his opinion in the *Sacher* case and his address to the American Bar Association of November 2, 1953.

With respect to the modified penalty and the findings of contempt sustained, this Court will remember that the summary judgment finding that appellant engaged on occasions in loud and boisterous speech afforded appellant no opportunity to offer evidence in contradiction or mitigation of such charges, which appellant would have offered if an opportunity to speak in person or by counsel had been accorded in the usual American concept.

In considering punishment aspects this Court should bear in mind that Mr. Offutt was actually committed without bail by the judge below and served some six hours of his sentence before this Court granted bail on appeal. He has been put to great expense in defending the charges made against him, the majority of which have now been found to be unjustified. He has suffered injury to his good name and reputation and much mental anguish because of the wide publicity given all of the charges lodged against him by the trial judge and, of course, will suffer from these charges in the future. In such circumstances, particularly as no punishment is being meted out to the other parties involved, we submit that further punishment of appellant is contrary to our conceptions of justice and fair play.

WHEREFORE, this Petition having been duly considered, it is respectfully prayed that this Petition for Rehearing be granted, that the decision and judgment of this Honorable Court of November 19, 1953 be reviewed and modified further as follows:

1. That this Honorable Court delete from footnote 1 its premature statement concerning the guilt of petitioner-appellant under finding 11.

2. That the judgment below be reversed; or

3. That the decision and judgment of this Honorable Court of November 19, 1953, and the judgment below, be further modified, and that in lieu of imprisonment, a fine be imposed upon appellant in such sum as to this Court seems just and equitable under the circumstances of this case; or

4. That the reduced sentence of imprisonment of 48 hours imposed by this Honorable Court in its decision and judgment of November 19, 1953 be suspended.

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Attorneys for Petitioner-Appellant.

Certificate of Counsel

Counsel for petitioner and appellant certify that this Petition for Rehearing is presented in good faith and not for delay.

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Attorneys for Petitioner-Appellant.

[fol. 303] IN THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 11,466

[Title omitted]

Before Edgerton, Bazelon and Fahy, Circuit Judges, in
Chambers

ORDER DENYING PETITION FOR REHEARING—Filed December
15th, 1953

Upon consideration of appellant's petition for a rehearing in the above-entitled case and for modification of the opinion and judgment of this Court, it is

Ordered by the Court that the aforesaid petition be, and it is hereby, denied.

It is Further Ordered by the Court that the opinion entered herein be, and it is hereby, amended by striking the third sentence of footnote 1 on page three, and substituting therefor the following sentence:

"The question of the correctness of the court's finding that appellant was in contempt of court in issuing the subpoenas referred to in finding 11 is not before us and we express no opinion on it, for he does not appear to have issued the subpoenas 'in the actual presence of the court' and therefore was not on their account summarily punishable by the presiding judge."

so that footnote 1, as amended will read as follows:

"¹ Finding 1 makes findings 3, 4, and 8 credible, but we do not pass upon them since the record necessarily fails to show boisterousness, belligerent tones, etc. We think finding 5 lacks adequate support. The question of the correctness of the court's finding that appellant was in contempt of court in issuing the subpoenas referred to in finding 11 is not before us and we express no opinion on it, for he does not appear to have issued the subpoenas 'in the actual presence of the court' and therefore was not on their account summarily punish-

able by the presiding judge. Federal Rules of Criminal Procedure, Rules 42(a) 42(b). We have not considered findings 7, 9, and 10."

Per Curiam.

[File endorsement omitted.]

[fol. 304] IN THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 11,466

[Title omitted]

MOTION OF APPELLANT FOR A STAY OF THE MANDATE—Filed
December 17, 1953

Comes now the appellant, Dorsey K. Offutt, in the above-entitled appeal, by his attorneys and moves this Honorable Court for a stay of the Mandate of this Court and for grounds in support thereof alleges:

1. Appellant will file within the time prescribed by law a Petition with the Supreme Court of the United States for a Writ of Certiorari, seeking the review by the Supreme Court of this Court's decision and final judgment as amended in this appeal.

2. The decision of this Court in this appeal refers to the decision of this Court of November 19, 1953 in *Peckham v. United States*, No. 11487. This means that in preparing petitioner's application for Certiorari, both opinions of the Court will have to be considered and treated and the voluminous record involved restudied. Counsel for petitioner will need the full time allowed by law within which to prepare and file a Petition for Writ of Certiorari. The question is unsettled in the Supreme Court in view of the enactment of the Act of June 25, 1948, 62 Stat. 928, as to whether or not appellant has thirty days or ninety days within which to file his Petition for Certiorari. Accordingly, it is requested that the Mandate be stayed for a period of ninety days within which to permit appellant to file his Petition for Certiorari in the Supreme Court of the United States.

[fol. 305] 3. The holiday season is upon us and counsel for appellant as general counsel must attend a meeting of the Council of the American Association for the Advancement of Science on December 29 and 30, 1953 in Boston, Massachusetts; has a trial specially set in the District Court of the United States for January 7, 1954 and another trial specially set in the District Court of the United States for January 11, 1954. Both of these cases involve out of town witnesses and may take weeks to try. Counsel is also engaged at the moment in a series of hearings with representatives of the Office of Defense Mobilization and with the Board of Contract Appeals of the Air Force of the United States. This means counsel cannot devote the next thirty days to the preparation of a Petition for Certiorari in the instant appeal and will need the full time allowed by law if justice is to be done to that Petition and to the appellant.

4. And for other reasons apparent on the face of the record.

Respectfully submitted, Warren E. Magee; Charlotte Maskey, Counsel for Petitioner.

CERTIFICATE

Counsel certify that the above-entitled Motion is filed in good faith and is not filed for purposes of delay.

Warren E. Magee, Charlotte Maskey, Counsel for Petitioner.

[fol. 306] ACKNOWLEDGMENT OF SERVICE OF THE FOREGOING MOTION, DATED DECEMBER 17, 1953, OMITTED IN PRINTING

[fol. 307] IN THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 11,466

[Title omitted]

Before Edgerton, Acting Chief Judge, in Chambers

ORDER GRANTING THE MOTION FOR STAY OF MANDATE—Filed
December 24, 1953

Upon consideration of appellant's motion for a stay of the mandate in the above-entitled case pending the filing in the Supreme Court of the United States a petition for review on Writ of Certiorari, and it appearing that no objections to this motion have been filed, it is

Ordered that the issuance of the mandate herein be, and it is hereby, stayed to and including January 17, 1954.

[File endorsement omitted.]

[fol. 308] IN THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 11,466

[Title omitted]

DESIGNATION OF RECORD—Filed January 6, 1954

The Clerk will please prepare a certified transcript of record for use on Petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause and include therein the following:

1. Joint Appendix.
2. Minute Entry of Argument.
3. Opinion.
4. Judgment.
5. Opinion in case of Henry L. Peckham, Jr. v. United States of America, No. 11,487. This opinion is referred to and made a part of the opinion in this case.

6. Petition for Rehearing.
7. Order denying petition for rehearing.
8. Motion to Stay Mandate.
9. Order Granting Stay of Mandate.
10. This Designation of Record.
11. Clerk's Certificate.

Warren E. Magee, Counsel for Appellant.

CERTIFICATE OF SERVICE

I certify that a copy of the above Designation of Record, was mailed this 6th day of January, 1954, to United States Attorney, New Court-house, Washington, D. C.

Warren E. Magee, Counsel for Petitioner.

[File endorsement omitted.]

[fol. 309] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 319] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. —

DORSEY K. OFFUTT, Petitioner,

vs.

UNITED STATES OF AMERICA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 12, 1954.

Earl Warren, Chief Justice of the United States.

Dated this 13th day of January, 1954.

[fol. 311] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1953

NO. 589

DORSEY K. OFFUTT, AN ATTORNEY, PETITIONER,

VS.

UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI—Filed April 5, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

(5567)

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FILED
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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

DORSEY K. OFFUTT, An Attorney, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1953

No.

DORSEY K. OFFUTT, An Attorney, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT**

Petitioner, Dorsey K. Offutt, an attorney at law, respectfully prays that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit, entered November 19, 1953, modifying a summary contempt judgment entered by Judge Alexander Holtzoff of the United States District Court for the District of Columbia, and reducing appellant's sentence of imprisonment from ten days to forty-eight hours.

THE OPINIONS BELOW

The United States District Court for the District of Columbia summarily adjudged petitioner in contempt of court and sentenced him to ten days' imprisonment. The Certificate of the District Court adjudging petitioner in contempt was entered June 16, 1952 (R. 25-29). The opinion of the United States Court of Appeals for the District of Columbia Circuit, modifying the District Court's adjudication of contempt and reducing appellant's jail sentence from ten days to forty-eight hours, has not yet been reported and appears at R. 264-267. The opinion of the Court of Appeals in the case of *Henry L. Peckham, Jr. v. United States of America*, No. 11,487, decided the same day, which is referred to and made a part of the Offutt opinion by reference, has not yet been reported and appears at R. 269-290.

JURISDICTION

The decision and judgment of the Court of Appeals were entered on November 19, 1953. Petitioner timely filed a Petition for Rehearing (R. 291-302). The Court of Appeals entered an order denying this petition on December 14, 1953 but in that order deleted footnote 1 on page 3 of the original opinion and entered a new footnote 1, having reference to finding 11 of the District Court. The Court of Appeals stayed its mandate pending application to this Court for certiorari (R. 306). On January 15, 1954, this Court extended the time for filing the Petition for Writ of Certiorari to and including February 12, 1954. The jurisdiction of this Honorable Court is invoked under the Act of June 5, 1928, 28 U. S. C. A., Sections 1254 and 2101, and Rule 37 of the Federal Rules of Criminal Procedure.

SUMMARY STATEMENT

This case presents for correction errors of the United States District Court for the District of Columbia, erroneously affirmed by the United States Court of Appeals for the District of Columbia Circuit. The case is one of importance. It involves important questions dealing with the right of an accused not to be deprived of his liberty without due process of law under the Fifth Amendment and to have the effective "Assistance of Counsel" as guaranteed by the Sixth Amendment to the Federal Constitution.

Petitioner, Dorsey K. Offutt, is a respected member of the Bar in good standing. On April 4, 1952 an indictment was returned in the United States District Court for the District of Columbia against Dr. Henry L. Peckham, a practising physician (R. 2). The indictment charged Dr. Peckham with committing two separate abortions at two different times involving the same complaining witness, a Mrs. Mary Lee Ott (R. 2). On May 23, 1952 petitioner entered his appearance for Dr. Peckham (R. 4). On the same day he appeared in the District Court and argued several preliminary motions. On May 26, 1952 petitioner argued a motion before Chief Judge Laws of the District Court which, among other things, sought a continuance to take the deposition of the mother of the complaining witness. This continuance was denied (R. 41-44). On May 27, 1952 the case was called for trial before Judge Alexander Holtzoff of the District Court and the trial commenced (R. 44). The trial lasted thirteen days. Twenty witnesses testified for the government and ten for the defense. Throughout the trial petitioner was sick, nervous and upset (R. 70, 72, 115). On numerous occasions during the trial, Judge Holtzoff addressed petitioner in a manner obviously upsetting and disconcerting, such as "stupid" (R. 55); "discourteous" (R. 139); "unethical" (R. 139); and with "losing his mind" (R. 226). The trial judge also

accused petitioner of being "insolent" on many occasions in and out of the presence of the jury (R. 76, 127, 226). The trial judge threatened to have the marshal pull petitioner to his seat and have him gagged (R. 180, 213, 215) and jailed (R. 81-82). Whenever petitioner asked in what respect he was guilty of misconduct, the judge rebuked him and refused his request for information.

For the first three days of trial the relations between the court and appellant were without serious incident. On June 3, 1952 difficulties commenced, because the judge rebuked counsel for his conduct but later expressed the view that he did not think counsel meant anything contumacious by his conduct (R. 69). The situation became further complicated because the prosecutor made uncomplimentary and prejudicial statements regarding petitioner (R. 70, 88, 105, 127, 128, 137, 138, 179, 180, 218). On one occasion, in the presence of the jury, the prosecutor stated that petitioner had threatened to punch him in the nose (R. 45-46). In no instance did the judge rebuke or admonish the prosecutor for his conduct (R. 287-290). Yet the record is replete with numerous instances of colloquy between the court and petitioner on which occasions the trial judge rebuked and chastized petitioner, even in the presence of the jury, and subjected petitioner to great provocation (R. 266, 267, 285, 290).

On June 16, 1952 the trial judge delivered his charge to the jury, who retired at 12:40 p. m. Immediately thereafter, but before the jury returned its verdict, the trial judge summarily adjudged petitioner guilty of criminal contempt of court, within the meaning of Rule 42(a) of the Federal Rules of Criminal Procedure, for petitioner's conduct during the trial and forthwith sentenced him to ten days in jail and committed him (R. 22).

No hearing was afforded petitioner. He was denied any right of defense, any right of explanation and the right to consult counsel (R. 257-258). Petitioner attempted to

deny guilt and requested a stay for a short time to consult counsel. This was denied and he was forthwith taken into custody by the marshal and removed from the courtroom, notwithstanding that the verdict of the jury had not yet been returned. After the petitioner had been arrested, a copy of the specifications of contempt and the order thereon were delivered by the trial judge to associate counsel for Dr. Peckham in the courtroom (R. 256-258). On the same day petitioner filed a written motion for bail, which was summarily denied by the judge without argument (R. 32-33). The specifications of contempt consisted of twelve main charges alleging different contempts (R. 25-29). By actual count, excluding the general contempt citation, the specific instances of alleged contemptuous conduct upon which the trial judge relied were 68 in number (R. 25-29). Petitioner perfected his appeal to the United States Court of Appeals for the District of Columbia Circuit on the day of his commitment (R. 22-24). An immediate appeal was necessary because the trial judge arbitrarily denied bail. This meant that petitioner's sentence would be carried out and he would have been deprived of any appeal contrary to *St. Pierre v. United States*, 319 U. S. 41, 63 S. Ct. 910, 87 L. Ed. 1198, and *Sacher v. United States*, 343 U. S. 1, 72 S. Ct. 451.

On June 16, 1952, the day petitioner was committed, the Court of Appeals granted bail on appeal. Appellant is at liberty on bail (R. 40-41).

Because of the importance of the questions involved, the Court of Appeals granted the parties permission to file briefs in excess of fifty pages and granted additional time for oral argument. On November 19, 1953 the Court of Appeals reversed charges 3, 4, 5, 7, 8, 9, 10 and 11 and affirmed charges 1, 2, 6 and 12 (R. 266-267).

Because of this modification of the findings the Court of Appeals concluded that the record did not support the penalty imposed and on the authority of *United States v.*

United States Mine Workers of America, 330 U. S. 258, 304 and *Rosenfeld v. United States*, 167 F. 2d 222, 225 (4 Cir.), unanimously concluded that petitioner's sentence should be reduced from ten days to forty-eight hours. Findings numbered 1, 4, 6 and 12 of the trial judge, which the Court of Appeals affirmed, may be summarized as findings that petitioner was (1) discourteous to the court, (2) repeated questions, some of which were intended to besmirch a witness, (6) asked prejudicial questions of the prosecuting witness without foundation and (12) tried to create an episode which might lead to a mistrial. The Court of Appeals affirmed the summary judgment of contempt based on these findings, notwithstanding that that court found that petitioner's "conduct cannot fairly be considered apart from that of the trial judge" (R. 266). The reasoning of the court below was that appellant suffered "great provocation" from the trial judge (R. 266). Accordingly, that court concluded (R. 266-267):

The judge's treatment of appellant, examples of which are included in an appendix to our opinion in *Peckham v. United States*, decided today, and which is the chief factor in leading a majority of this court to conclude that Peckham's conviction cannot stand, leads us all to conclude that appellant's sentence should be reduced from 10 days to 48 hours.

Notwithstanding that the Court of Appeals was of the opinion that the judge's treatment of appellant was the "chief factor" in causing the court to reverse the *Peckham* case and to reduce the sentence, the court below permitted four findings of contempt to stand, even though the findings were made by a judge who subjected petitioner to "great provocation" (R. 266) and who was affirmatively found by the Court of Appeals to have showed a lack of impartiality, hostility and bias against petitioner and his client. The Court of Appeals has found that the prosecutor in the trial below also was guilty of prejudicial

misconduct (R. 281-282). Thus, we have a situation involving a hotly contested and highly controversial trial which resulted in an unfair trial, principally because of the conduct of the trial judge, and contributed to by misconduct of the prosecutor. The trial judge was personally involved and invaded the area reserved to counsel, thus creating a conflict which arose in the trial and out of which the contempt citation grew (R. 266-267, 281-282). Notwithstanding that the Court of Appeals reversed 8 of the 12 grounds upon which the contempt citation rested, that court has ordered that petitioner be sentenced to jail for forty-eight hours, and this even though as the court below held (R. 266) petitioner's "conduct cannot fairly be considered apart from that of the trial judge." We are of the view that this Court has held that contested criminal cases must be supervised and controlled only by a "neutral judge" (*Sacher v. United States*, 343 U. S. 1, 8) and that where the right of counsel to vigorously defend his client is infringed by a judge, counsel will be protected. (*Sacher v. United States*, supra, 9, 13).

A Petition for Rehearing was timely filed below (R. 291-302). In that petition we pointed out that while the proper respect is due the Bench, this Court's warning in the *Sacher* case should be borne in mind that both judges and lawyers are human and both are heirs to all the weaknesses of the human flesh. We pointed out further that while the dignity of the Bench should be upheld, because the conduct of counsel could not be separated from the misconduct of the judge, the ends of justice would have been served if appellant's sentence had been reduced to a fine or suspended in the event that court did not feel as we did, that the sentence in toto should be voided. While the court modified its opinion, in accordance with the first prayer of our petition, it refused to further modify its judgment of November 19, 1953 and permitted a jail sentence against petitioner to stand, even though imposed summarily and without a hearing by a biased and

prejudiced judge who invaded the area reserved to counsel, provoked counsel and by his conduct deprived petitioner's client of a fair and impartial trial.

As we view Rule 42 of the Federal Rules of Criminal Procedure, existing legislation and the applicable decisions of this Court, summary punishment cannot be imposed upon an attorney acting in the defense of a criminal case by a biased and prejudiced judge, who has invaded the area reserved to counsel and who became so personally involved in the trial that petitioner's conduct cannot be considered apart from the judge, and in such a situation an attorney is entitled to a hearing by another judge under Rule 42(b). *Cooke v. United States*, 267 U. S. 517, 69 L. Ed. 767.

As this situation is important, not only to petitioner but to all trial attorneys, certiorari was sought to correct the manifest injustice involved in the ruling below, which jails an attorney for contempt, notwithstanding that it has been found by the Court of Appeals that the alleged contemptuous situation arose through improper actions of the trial judge and the prosecutor.

QUESTIONS PRESENTED

The Court of Appeals modified a summary order of contempt of the District Court, sentencing petitioner to jail for ten days and reduced that sentence to forty-eight hours. In reducing the sentence that court held that this was necessary because the trial judge provoked petitioner, showed bias and prejudice and by his treatment of petitioner, which could not be separated from the conduct of petitioner, barred the appellate court from sustaining the proceedings below as fair and impartial (R. 266, 281-282).

In reversing the *Peckham* case and in modifying the judgment in the *Offutt* case, the court below held (R. 281-282):

A number of other questions are presented generally. These include claims of degrading and belittling remarks directed at defense counsel by the judge, restrictions upon cross-examination, the judge's assumption of the function of an advocate, lack of impartiality, and prejudicial remarks by the prosecutor. As to the effect of these matters on the fundamental fairness of the trial this court finds itself divided. Judge Edgerton and Judge Bazelon, constituting a majority of the court, are convinced that the excessive injection of the trial judge into the examination of witnesses, his numerous comments to defense counsel, indicating at times hostility, though under provocation, demonstrated a bias and lack of impartiality which may well have influenced the jury; that, considering these matters and others, examples of which are set forth in an Appendix attached hereto, this court is barred from sustaining the judgment as the product of a fair and impartial trial. This necessitates reversal.

The writer of this opinion feels decidedly that it would have been preferable for the court to have restrained his interruption of the examining process. The Government was well represented and the extent of the judge's participation was not required by his obligation to maintain a firm and salutary control of the proceedings. We have today in No. 11466, *Offutt v. United States*, sustained the contempt conviction of defense counsel due to his conduct in this case but we have reduced the sentence. By sustaining the conviction we have expressed our conclusion that counsel was contemptuous, while in reducing the sentence we have reflected our view that his conduct was not altogether separable from that of the judge in treading the area reserved for counsel, thus creating conflict and engendering remarks and attitudes on the part of both court and counsel which afflicted the trial.

As we read the language of the court below in the light of the examples set forth in the appendix to the *Peckham* opinion (R. 285-290), that court held that petitioner was subjected to great provocation from the trial judge

(R. 266), that "degrading and belittling remarks" were "directed to defense counsel" by the judge, that the judge assumed "the function of an advocate" and displayed "lack of impartiality" (R. 281-282). In reversing the *Peckham* case, the court below concluded that these actions of the trial judge and his excessive "injection . . ." into the examination of witnesses (and) his numerous comments to defense counsel, indicating at times hostility . . . demonstrated a bias and lack of impartiality . . . rendered the trial unfair. The court below concluded that the "treatment of appellant" by the trial judge was the "chief factor" which led the court below to conclude that neither the conviction of *Peckham* nor the sentence of petitioner could stand unmodified (R. 266-267). Against this background we say that the following questions are presented:

1. Whether the biased and prejudiced conduct of the trial judge and his treatment of petitioner precluded the trial judge from exercising against petitioner the summary power to hold petitioner in contempt of court, provided for in Rule 42(a) of the Federal Rules of Criminal Procedure.

2. Whether the findings of the Court of Appeals in affirming the judgment as modified, which show that the trial judge participated in the trial in such prejudicial fashion as to provoke petitioner to do the things which he did and upon which the modified judgment of contempt now rests, render the modified and summary judgment of contempt void because entered by a judge who was provocative and not impartial, as required by the rulings of this Court in *Cooke v. United States*, 267 U. S. 517, 69 L. Ed. 767, and *Tumey v. Ohio*, 273 U. S. 510, 47 S. Ct. 437, 71 L. Ed. 749.

3. Whether a trial judge who has been found by the Court of Appeals to have invaded the area reserved to

counsel, who provoked counsel and who has shown hostility, prejudice and a lack of impartiality against petitioner was disqualified to exercise the summary power of contempt provided for in Rule 42(a) because of the decisions of this Court in *Cooke v. United States*, supra and *Toney v. Ohio*, supra.

4. Whether the exercise of summary power of contempt provided for in Rule 42(a), under the circumstances as now found by the Court of Appeals, was appropriate and proper. In this connection it can be assumed that the trial judge had summary power under Rule 42(a) but it should be remembered that the summary judgment of contempt against petitioner came at the conclusion of the charge to the jury and notwithstanding that the trial judge had ample opportunity to afford petitioner a hearing within the usual conception of the due process of law as required by the Fifth Amendment to the Constitution without impeding or otherwise restricting the trial in the *Peckham* case.

5. Whether under all the circumstances of the case as now decided by the Court of Appeals in the *Offutt* and *Peckham* cases, which must be read together, petitioner was denied due process of law in violation of the Fifth Amendment by the trial judge because that judge proceeded summarily and denied petitioner the right to notice, charges, a hearing, including the right to offer evidence in contradiction or mitigation of such charges and to be represented by counsel.

6. Whether the exercise of summary power to adjudge an attorney, acting as defense counsel in a criminal case, in contempt exceeds the bounds of fair discretion as applied to those charges of contempt which the Court of Appeals has sustained, notwithstanding that that court has found that the judge imposing that summary sentence was hostile, prejudiced and not impartial and guilty of provocation.

7. Whether this Court should exercise its power (described in *Sacher v. United States*, 343 U. S. 1, 9, 13) and protect defense counsel in a criminal case in the fearless, vigorous and effective performance of the duties pertaining to the office of advocate against an arbitrary exercise of summary contempt power under Rule 42(a), when the Court of Appeals sustained specifications dealing only with discourteous remarks, repeating questions, asking prejudicial questions of the prosecuting witness in an abortion case and sought a mistrial, where there is no finding either by the trial judge or the Court of Appeals that this specified conduct impeded the trial or obstructed the progress of the trial. In this connection it must be borne in mind that the trial judge did not find, nor did the Court of Appeals find, that there was a willful intent on the part of petitioner to violate court rulings in doing what he did to protect his client in the trial below, which trial has now been held by the Court of Appeals to be a mistrial mainly because of the conduct of the trial judge. In the absence of bad motives and specific intents, contempt charges in such circumstances summarily imposed upon trial counsel cannot be sustained. *In re Watts and Sachs*, 190 U. S. 1, 32, 35.

8. Whether this Court should protect petitioner in accordance with *Sacher v. United States*, supra, 1, 9, 13, when the record shows that the District Court is conducting proceedings seeking to disbar petitioner from the practise of his profession, predicated in part on the summary findings entered by the trial judge, four of which have been affirmed on appeal, notwithstanding that the trial judge's conduct and the misconduct of the prosecutor were such as to require a modification of the sentence imposed upon petitioner and the reversal of the main action because such conduct was prejudicial and rendered the trial unfair.

CONSTITUTIONAL PROVISIONS, STATUTE AND RULE INVOLVED

Constitution of the United States:

Article III, Section 2(3)

The trial of all crimes, except in cases of impeachment, shall be by jury: * * *

Fifth Amendment. No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *

Sixth Amendment. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

Title 18, Section 401, U. S. C. A., Chapter 21:

Power of Court:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Federal Rules of Criminal Procedure, Title 18, U. S. C. A.

Rule 42. Criminal Contempt.

(a) Summary Disposition. — A criminal contempt may be punished summarily if the judge certifies that

he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) *Disposition Upon Notice and Hearing.* — A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant, or, on application of the United States Attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilty, the court shall enter an order fixing the punishment.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In not granting a jury trial to appellant on the four charges of contempt which were affirmed below.
2. In finding as a matter of law and of fact that the four instances cited, or any of them, constituted criminal contempt in violation of Rule 42(a) of the Federal Rules of Civil Procedure contrary to the provisions of the Fifth and Sixth Amendments to the Constitution.
3. In affirming four findings of contempt summarily entered by a trial judge under Rule 42(a) of the Federal Rules of Criminal Procedure, notwithstanding that the court below has found that the trial judge was personally

involved, showed hostility and bias, a lack of impartiality, provoked petitioner and invaded the area reserved to counsel.

4. In affirming summary findings of contempt imposed by a prejudiced and hostile judge, where there was no finding that petitioner's conduct impeded the trial or was willful and taken with bad motives.

5. In affirming findings of contempt imposed under the facts and circumstances as now determined by the Court of Appeals where the findings violate the provisions of the Fifth and Sixth Amendments to the Constitution of the United States and have the effect of hindering and preventing petitioner in carrying out the office of an advocate and rendering effective "Assistance of Counsel," guaranteed to every defendant in a criminal case.

REASONS FOR GRANTING THE WRIT

Several of the reasons usually advanced for the allowance of a Writ of Certiorari are present in this case. The court below has rendered a decision in conflict with other Circuit Courts of Appeals, has decided important questions of law contrary to earlier decisions of that court and has decided important questions of Federal law in conflict with the applicable decisions of this Court. In addition, the court below has permitted and sanctioned such a departure from the accepted and usual course of judicial proceedings in the exercise of the summary power of contempt by a lower court as to call for the exercise of this Court's power of supervision. The decision below also decides questions of general importance and of substance relating to the construction and application of the Federal Constitution, a Federal Statute and Rule 42 of the Federal Rules of Criminal Procedure and in deciding these questions has not given proper effect to the applicable decisions of this Court.

In its decision the court below, after reversing the findings of the trial judge numbered 3, 4, 5, 7, 8, 9, 10 and 11, held (R. 266) that the record "does not support the penalty imposed" because the appellant's conduct "cannot be considered apart from that of the trial judge." The reasoning of the court below, among other things, was that petitioner suffered "great provocation" from the trial judge. Yet, instead of reversing the summary judgment of contempt imposed by the trial judge, the court below reduced the sentence of ten days to 48 hours. We submit that the summary judgment under the facts as now determined by the Court of Appeals should have been reversed in its entirety. The court below reviewed the actions of the trial judge and as we read that review (R. 266, 281-282) concluded that petitioner was subjected to "great provocation," "degrading and belittling remarks" and that the trial judge in doing what he did assumed "the function of an advocate" and displayed lack of impartiality, hostility and bias. The situation was further complicated to petitioner's prejudice because of the misconduct of the prosecutor (R. 281-282, 287-290). The court below pinpointed its condemnation of the trial judge by holding that his "treatment of appellant" (petitioner) was the "chief factor" in causing the court below to reverse the *Peckham* trial and reduce petitioner's sentence. We submit that in such a situation where it has been determined on appeal that the trial judge was guilty of "provocation", "hostility", "bias" and "lack of impartiality" and sanctioned misconduct of the prosecutor and thereby deprived petitioner's client of a fair and impartial trial and *invaded the area reserved to counsel*, thus creating conflict, that the principles announced by this Court in *Cooke v. United States*, 267 U. S. 517, 539, and *Tumey v. Ohio*, 273 U. S. 510, should be applied and the summary judgment of contempt entered below should

be reversed in its entirety. Our contention is supported by the Advisory Committee Notes pertaining to Rule 42(b) of the Federal Rules of Criminal Procedure, 18 U. S. C. A., page 495, Note 4, which states:

that the provision in the sixth sentence disqualifying the judge affected by the contempt if the charge involves disrespect to or criticism of him is based, in part, on * * * and the observations of Chief Justice Taft in *Cooke v. United States*, 45 S. Ct. 390, 267 U. S. 517, 539; 69 L. Ed. 767.

As the Court of Appeals has found that the trial judge became personally involved in the four findings remaining unreversed of his contempt citations, summary proceedings should not have been indulged in and should not have been upheld on appeal.

Moreover, the decision below which now upholds a judgment entered by a trial judge found by the Court of Appeals to be biased and prejudiced, conflicts with an earlier decision of the same court. *Whitaker v. McLean*, 73 App. D. C. 259, 118 F. 2d 596.

The existence of the power to punish summarily for contempt does not mean that it is always appropriate to use it. *Cooke v. United States*, supra.

This summary power should never be used where the trial judge is personally involved, shows hostility and bias and invades the area reserved to counsel in such fashion as to render the trial unfair. The employment of summary power to adjudge a lawyer in contempt seems inherently to involve the basic thought that the judge exercising such arbitrary power should be free from fault and should be precisely correct in his conduct. After all, the judge and the lawyer are both human and are both officers of the court. As this Court pointed out in *Sacher v. United States*, 343 U. S. 1, 8, there is strife in the trial of a contested criminal case, hence the supervision and control over counsel must be exercised "by a neutral judge." In

the *Sacher* case, this Court made it clear that where the vigorous defense of counsel brings him in conflict with the trial judge and where the area reserved to counsel is infringed by the trial judge, counsel will be protected against the exercise of summary contempt power. Thus, this Court in the *Sacher* case held (p. 9):

Of course, it is the right of counsel for every litigant to press his claim, even if it appears far fetched and untenable, to obtain the court's considered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts.

and at page 13:

But that there may be no misunderstanding, we make clear that this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever.

It seems to us that the conflict below arose because of certain philosophies held by the trial judge on how court-room procedures should be expedited. In a recent address delivered on April 6, 1953 before the Philadelphia Regional Chapter of the American Society for Public Administration, University of Pennsylvania (14 F. R. D., pp. 323-330), the trial judge opened his speech with a statement that "the legal profession is now conscious of its own frailties," and quoted the lines of Gilbert spoken by the Lord Chancellor in "*Iolanthe*" (p. 323):

The Law is the true embodiment
Of everything that's excellent,
It has no kind of fault or flaw
And I, my Lords, embody the Law.

The trial judge then urged streamlining of cases for trial, that jurors should be examined on the voir dire by

the judge alone and stated that the judge himself could select a jury in a criminal case in an hour or less and in routine civil or criminal cases in less than ten minutes and rarely more than twenty minutes. The judge stated his philosophy of expediting trials as follows (p. 326-327):

Other means of expediting a trial involve the constant and continuous exercise of firm control by the judge. Too often, in State courts particularly, he is regarded as a mere moderator or chairman. This is not the wholesome common law concept. The judge should participate in the trial and regulate its course. He should not permit it to leave its proper channel. He has the right to exclude of his own motion all immaterial and irrelevant evidence and confine the trial to the issues to be determined.

Further, the trial judge stated (p. 327) "the court is clothed with power * * * to curb" counsel's interrogation of witnesses and contended that prolonged examinations caused departures, tangents and side issues which distract juries. We submit that the application of these principles to some extent caused the judge below to invade the area reserved for counsel as found by the court below (R. 282), and caused the conflict between the judge and the petitioner. Now that the court below has further found that the trial judge's treatment of petitioner showed bias, hostility and a lack of impartiality, the summary judgment imposed by him against petitioner should not be permitted to stand. We, of course, realize that the dignity of the Bench must be upheld, but as this Court warned in the *Sacher* case, judges too are heirs to all of the weaknesses of the human flesh and where a judge by his conduct provokes incidents, invades the lawyer's field and creates strife, it does not seem fair to us that, under such circumstances, an attorney endeavoring to carry out the duties of an advocate as best he can in order to afford the effective "Assistance of Counsel" guaranteed an accused by the Sixth Amendment to our Constitution, should be held in contempt if he fights

back and attempts to meet such conduct on the battlefield of the judge's choosing, the open court. The ends of justice in such an instance would be best served by the language of an appellate court's opinion rather than by the imposition of imprisonment upon counsel alone.

The decision below raises questions of vital importance to courts and trial counsel alike and is contrary to *Cooke v. U. S.*, supra, *Tumey v. Ohio*, supra and *Whitaker v. McLean*, supra. It sanctions such a departure from accepted and usual course of judicial proceedings in enforcing contempt powers as to call for the exercise of this Court's powers of supervision and correction. The important principles involving the exercise of contempt power by a biased and prejudiced judge under Rule 42 of the Federal Rules of Criminal Procedure should be decided by this Court in the public interest and in the aid of the proper administration of criminal justice.

II.

It has long been a fundamental concept of American jurisprudence that the judge who presides over civil and criminal cases should be fair, unbiased and completely impartial. Any bias, hostility or prejudice, or even interest in the outcome of a given civil or criminal case will disqualify a judge from presiding over that case. *Tumey v. Ohio*, 273 U. S. 510, 47 S. Ct. 437, 71 L. Ed. 749.

In the *Tumey* case in ruling that the presiding judge in a judicial proceeding in our country under either the Fifth or Fourteenth Amendments must be impartial and in defining the term "due process of law" this Court said (p. 535) due process requires that the presiding judge be impartial and if that judge is not impartial he is disqualified to enter any judgment thereafter in the proceedings. Thus, this Court said in reversing a judgment imposed by a Ohio judge (p. 535):

It is finally argued that the evidence shows clearly that the defendant was guilty and that he was only fined \$100, which was the minimum amount, and therefore that he can not complain of a lack of due process, either in his conviction or in the amount of the judgment. The plea was not guilty and he was convicted. No matter what the evidence was against him, he had the right to have an impartial judge. He seasonably raised the objection and was entitled to halt the trial because of the disqualification of the judge * * *.

To affirm a judgment of conviction imposed by a judge whom the Court of Appeals found to be biased, prejudiced and not impartial is contrary to the national solicitude that tribunals of this country shall not only be impartial to controversies submitted to them, but shall give assurance that they are impartial and free from any bias or prejudice that might disturb the normal course of impartial judgment. *Berger v. United States*, 255 U. S. 22, 35, 36, 41 S. Ct. 230, 65 L. Ed. 481.

Where bias or prejudice is shown on the part of the presiding judge, it is the duty of that judge to proceed no further in the case and not to enter a final judgment. As our Court of Appeals has found the trial judge here was biased and prejudiced and lacked impartiality, it follows even under Rule 42(a) that he could not proceed further and certainly could not enter a summary judgment of contempt because being biased that judgment would not be impartial. That court has applied the principles of the *Berger* case to bias arising during the course of a trial. *Whitaker v. McLean*, 73 App. D. C. 259, 118 F. 2d 596.

In the *Whitaker* case the court below reversed the action of the trial judge because it appeared in a colloquy with counsel during the trial, occurring in the absence of the jury, that the trial judge made certain remarks which caused plaintiff's counsel to express the opinion that he could not very well go on because of the judge's remark

evidenced bias and prejudice. At the conclusion of this bench colloquy the trial, nevertheless, proceeded and at the close of the testimony the trial judge directed a verdict for the defendant. In reversing this case, our Court of Appeals said (p. 596-597):

The judge may, as indeed he insisted, have felt no hostility to the plaintiff, and in that view he was subjectively free from bias. But bias must be considered objectively. Few, if any, judges would make the reported remarks, in the course of a trial unless they had developed definite and positive hostility to the plaintiff and his case. Hostility is a form of bias. When a judge has shown bias before trial, Section 21 of the Judicial Code, 28 U. S. Code Annotated, Sec. 25 provides means of disqualifying him. The policy underlying Sec. 21 is the Courts of the United States 'shall not only be impartial in controversies submitted to them but shall give assurance that they are impartial;' i.e. shall appear to be impartial. *Berger v. United States*, 253 U. S. 22, 36; 41 S. Ct. 230, 235;

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A bias which develops during the trial and 'is grounded on the evidence' has been held not to be within the terms of Section 21. * * * Often some degree of bias develops inevitably during the trial. Judges cannot be forbidden to feel sympathy or aversion for one party or the other. Mild expressions of feeling are as hard to avoid as the feeling itself. But a right to be tried by a judge who is reasonably free from bias is part of the fundamental right to a fair trial. If, before a case is over, a judge's bias appears to have become overpowering, we think it disqualifies him.

The action of the court below in permitting a summary judgment of contempt to stand when that court has found that the trial judge who imposed the sentence was guilty of bias, hostility and a lack of impartiality, is contrary to the rulings of this Court in the *Tumey* and *Berger* cases and to the decision of the court below in the *Whitaker* case

and is a denial of due process of law guaranteed to petitioner under the Fifth Amendment. Even if we assume the existence of the summary power to adjudge an attorney in contempt, under the circumstances which the Court of Appeals below has found to exist in affirming in part the summary contempt judgment here involved, we question whether it is appropriate to permit such a judgment to stand. In the first place, the Court of Appeals has found that the trial judge imposing the contempt sentence was hostile, prejudiced and not impartial and invaded the area reserved to counsel. These circumstances are sufficient to disqualify the trial judge from exercising the summary provisions of Rule 42(a).

Nor was it appropriate even if the trial judge was qualified to act, which is denied, to exercise the summary power of contempt provided for in Rule 42(a). The summary judgment attempted to be imposed by the trial judge came at the conclusion of the charge to the jury (R. 256). The trial judge had full opportunity to afford petitioner a hearing within the usual conceptions of due process of law as required by the Fifth Amendment. This procedure would not have impeded or obstructed the trial of the *Peckham* case. While summary contempt proceedings are authorized by Rule 42(a), we submit that the theory behind them is to "enforce obedience and order in the court and not to impose unconditional criminal punishment." *Sacher v. United States*, 343 U. S. 1, 22 (Dis. Op. J. Black), 29 (Dis. Op. J. Frankfurter).

In *In re Oliver*, 333 U. S. 257, 92 L. Ed. 682, this Court squarely held (pp. 274, 275) that the only time that the exercise of the "extraordinary but narrowly limited power to punish for contempt" by way of a summary proceeding is authorized and the "due process" requirements can be ignored is only where "charges of misconduct" occur "in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court and where immediate

punishment is essential to prevent 'demoralization of the court's authority' before the public."

When the need of preserving obedience has passed, there is no need to punish an alleged contempt in a summary manner and it should be dealt with as the law deals with other illegal and criminal acts (*Toledo Newspaper Co. v. United States*, 247 U. S. 402, 425-426) because summary power is "capable of grave abuses" and is limited in exercise to "the least possible power adequate to the end proposed." *In re Oliver*, supra, 274.

Article III, Section 2 of our Constitution requires that the trial of all crimes shall be by jury. Contempt proceedings are criminal prosecutions brought to punish public wrongs. While there are unusual instances in which this Court has upheld summary proceedings in contempt cases, nevertheless this Court has made it clear that such a proceeding should be used only if necessary to preserve order in the court or to prevent interference with the court's processes or business. Recent decisions of this Court have expressed caution in the exercise of summary contempt power. *Michaelson v. United States*, 266 U. S. 42; *Nye v. United States*, 313 U. S. 33; *Cooke v. United States*, 267 U. S. 517.

If summary proceedings are to be indulged in at the whim of a judge, particularly if that judge by his conduct has shown bias and prejudice against an attorney, the judiciary will have power to sentence and confine citizens of the United States without even the semblance of a hearing or any of the steps which have been considered necessary in a criminal case. Moreover, to permit a biased judge to so act would be tyrannical, oppressive and wrong. *Hovey v. Elliott*, 167 U. S. 409, 17 S. Ct. 841, 42 L. Ed. 215.

The warnings which this Court announced in 1897 in the *Hovey* case are peculiarly applicable and timely today. In condemning the exercise of the contempt power by a court of the District of Columbia, this Court held (p. 413):

The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.

As this Court so pointedly said in the *Hovey* case, a sentence pronounced without an opportunity and without the right of defense generally is not entitled to the respect of any tribunal and to commit a person without a hearing, except under the extraordinary exceptions approved by this Court to protect the court itself, would be a most flagrant violation of the rights of a citizen and could convert the judiciary into an engine of oppression capable of destroying great constitutional safeguards.

In the instant case no need was shown for the exercise of the summary power of contempt and its exercise in this case was oppressive and the wrongful culmination of the invasion by the trial judge of that area reserved to counsel, who was duty bound to give fearless and effective "Assistance of Counsel" to his client as required by the Sixth Amendment. *Johnson v. Zerbst*, 304 U. S. 458, *Powell v. Alabama*, 287 U. S. 45.

III.

The trial judge in taking the action he did and in sentencing petitioner to jail denied the petitioner the right to notice, charges, a hearing, including the right to offer evidence in contradiction or mitigation of such charges and the right to counsel. The summary contempt power of its very nature is subject to being exercised arbitrarily and in a fashion which will deprive an accused of all of the safeguards of due process of law as guaranteed by the Fifth Amendment. This contempt power should be narrowly

restricted and when used it should only be in cases of contempts occurring in the actual presence of the court which are willful and which if not immediately suppressed will disturb the court's business or interfere with the processes of the court. *Cooke v. United States*, supra.

When all of these elements are not present, the summary contempt power should not be used. The provisions of Rule 42(a) are permissive and do not require that all contempts occurring in the presence of the court be proceeded with summarily.

As the trial judge did not find in the four charges which were sustained on appeal, and as the appellate court likewise did not find in affirming these four charges that appellant's conduct obstructed the course of justice in some way and was done wilfully and with bad motives, the findings are void (*In re Watts and Sachs*, 190 U. S. 1, 32) and in any event should not have been entered summarily. To enter such abortive findings was both an inappropriate exercise of the summary power of contempt and exceeded bounds of fair discretion. In no event could a biased judge preside in such summary proceedings and enter judgment. *Tumey v. Ohio*, supra; *Whitaker v. McLean*, supra.

IV.

This Court held in *Sacher v. United States*, 343 U. S. 1, 9, 13, that it will protect defense counsel in a criminal case in a fearless, vigorous and effective performance of the duties pertaining to the office of an advocate against an arbitrary exercise of summary contempt power under Rule 42(a). We say this is an appropriate ease for the exercise of this power of protection. The specifications of contempt sustained by the Court of Appeals were imposed summarily by the trial judge and now relate to discourteous remarks, repeating questions, asking prejudicial questions of a prosecuting witness in an abortion case and the seeking of a mistrial. Neither the trial judge nor the Court of

Appeals found that there was a wrongful intent on the petitioner's part as counsel for Dr. Peckham to violate court rulings in doing what he considered to be his duty to protect his client in the controversial trial below. Moreover, that trial has now been held by the Court of Appeals to have been a mistrial, mainly because of the misconduct of the trial judge and his display of bias and prejudice directed against petitioner. Concerning the affirmed charges bad motives and specific intents must be proven and found against petitioner before contempt charges can be upheld, even if legally entered, which is not the situation here. *In re Watts and Sachs*, 190 U. S. 1, 32, 35.

Moreover, the record does not support the findings that counsel was discourteous to the trial judge when we view his conduct and measure it against the prejudicial conduct of the trial judge and the prosecuting attorney. The insolence of which the trial court complains were attempts made on the part of petitioner to have the record reflect personal mannerisms and tones of voice of the trial judge which petitioner considered were prejudicial to his client and improper (R. 74-79, 81-82, 113-114, 146, 154-155, 157-158, 177-179, 195-196, 209-210, 221-222).

The court below has held in other cases involving the same trial judge that counsel have the right to have the record reflect the personal mannerisms and personal conduct of that judge, if counsel deem such conduct prejudicial, as the conduct would otherwise not appear of record. *Butler v. United States*, 88 U. S. App. D. C. 140, 188 F. 2d 24; *Billeci v. United States*, 87 U. S. App. D. C. 274, 367 F. 2d 394; *Vinci v. United States*, 81 U. S. App. D. C. 388, 339 F. 2d 777.

In this respect the record will show that petitioner's objections were made in a respectful manner and that the trial judge, because of his sensitivity in his personal behavior, never denied the improper conduct charged to him by petitioner, but considered petitioner's efforts to have the record reflect that conduct as insolent and contemptu-

ous. Appellant's actions in noting his objections to the trial judge's conduct cannot be considered contempt, if the decisions of the court below in the *Butler*, *Billeci* and *Vinci* cases mean what they state.

The ruling of the trial judge which has been affirmed by the court below that the repeating of questions constitutes contempt is contrary to *Caldwell v. United States* (C.C.A. 9), 28 F. 2d 684; *Harris v. H. W. Gossard Co.*, 185 N. Y. Supp. 861, 194 App. Div. 688; and *Bennett v. Superior Court in and for San Diego County (Calif.)*, 222 P. 2d 876.

The ruling of the trial judge, which also has been affirmed by the court below, that questions of counsel directed to Mary Ott, the prosecuting witness, were contemptuous because those questions tended to besmirch her, is not supported by the record. Mary Ott was the complaining witness under both counts of the indictment which charged two separate abortions. The evidence showed that she had lived in adultery with her paramour, had led an immoral life and had been involved in prior and earlier abortions. It was the ruling of the trial judge that these earlier events and her living with other men while she was married was not admissible and it was petitioner's effort to get these facts into the record that are now treated as contemptuous and besmirching the prosecuting witness. A part of the defense was that there was a strong hypothesis that one of the abortions charged in the indictment could have been committed by the prosecuting witness upon herself. Her denial that she committed the abortion should not have foreclosed counsel's cross-examination to bring before the jury these facts and the moral character of this woman. It must be remembered that the defendant, Dr. Peckham, denied committing the abortion charged. It was consistent with this defense that the witness herself was not only capable of committing the abortion but she had previous experiences with abortions. Moreover, the evidence was admissible on credibility. The court below has so ruled.

Thompson v. United States, 30 App. D. C. 352, 12 Ann. Cas. 1004.

Meretricious relationships of witnesses may be shown in a criminal case as they affect morals, hence credibility, and show such witnesses in their true light. Questions to this end are proper and do not "besmirch" a witness, and this Court has so held. *Alford v. United States*, 282 U. S. 687, 692, 51 S. Ct. 218, 75 L. Ed. 736; *Tla Koo-yel-lee v. United States*, 167 U. S. 274, 17 S. Ct. 855, 42 L. Ed. 166.

Even the trial judge here involved has so ruled in the prosecutor's favor. *United States v. Edmonds*, 63 F. Supp. 968, 973.

Petitioner as defense counsel for the defendant was duty bound to raise these questions concerning the prosecutor's chief witness and to obtain a ruling of the trial court thereon so that he might preserve his contentions for appeal. Counsel was doing no more than this in asking the questions which he did and as the trial judge and the court below have failed to find that the questions asked by petitioner were willful and intentional violations of existing court orders, this finding is abortive and void. *In re Watts and Sachs*, 190 U. S. 1, 32, 35.

With respect to the finding of the trial judge that petitioner sought to provoke a mistrial, the Court of Appeals has now found that the trial below was a mistrial because of the improper conduct of the trial judge. In such a situation we do not see how, because counsel insisted throughout the trial that the judge's conduct had caused a mistrial, these actions can be treated as contempt. It seems anomalous to us when it is now admitted that appellant's motions to have a juror withdrawn and a mistrial declared were well taken, that he should now be held in contempt because he pressed this valid contention during the trial.

Finally, insofar as the four charges are concerned which the Court of Appeals has permitted to stand, as motives, intents and purposes are necessarily involved in each of these findings, petitioner should have been afforded the opportunity to testify and defend his motives, intents and

purpose both by way of defense and by way of mitigation. *Cooke v. United States*, supra; *Bowles v. United States*, 50 F. 2d 848, 850.

As no hearing was afforded and no evidence was taken concerning appellant's motives, intents and purposes, the judgment below is abortive and invalid as modified because based upon an incomplete and improper record. *Ohio Bell Telephone Co. v. Commission*, 301 U. S. 292.

And even if the remaining findings had found deliberate intent and willful misconduct, which they do not, the record would not support any such findings. The trial judge below on numerous occasions has specifically found throughout the trial that the conduct which resulted in his certificate was not done in bad faith and was not done intentionally by petitioner. Thus, at R. 69 petitioner stated to the judge when he was accused of being belligerent and insolent that he did not mean to be so, whereupon the judge replied, "I am sure you didn't, but still let it not be done." This is an important ruling because the judge was dealing with many "breaches of my rule" by petitioner (R. 68). At R. 70, when the judge objected to the mannerisms of petitioner and insisted that he must be calm and courteous, petitioner replied, "I mean to be courteous at all times, your Honor," whereupon the judge replied, "No you haven't, you may not be conscious of it." Again at R. 73 when the judge below discussed the tone of petitioner's voice "on several occasions" as being "somewhat belligerent" the judge stated, "And I would say you probably didn't intend it as such." And, at R. 89, after petitioner objected to the witness Ott's signaling answers to her mother (R. 88), the judge below suggested that petitioner was acting in an "excitable and in a boisterous manner," whereupon petitioner stated, "I did not mean to be boisterous." The judge said, "I assume that you didn't mean that" Later in the trial (R. 153) when petitioner was endeavoring to establish through cross-examination of Christianson,

a felon, the paramour of Mrs. Ott and the cause of her pregnancy, that he participated in the crime of abortion and was an accomplice, the judge suggested to petitioner that he should treat such a witness with a "little more courtesy." Petitioner thereupon assured the judge that he was being firm with the witness but he was entitled to get answers to his questions, that he was not discourteous and that he was speaking in a courteous tone, whereupon the judge said (R. 153) "You have a right to be firm." Thus, we submit that the trial judge has specifically found and ruled throughout the trial that appellant in doing what he did, did not mean to be contemptuous, did not mean to be boisterous, intended no discourtesy and had a right to be firm. How in such circumstances appellant can now be adjudged in contempt for these very situations is difficult for us to understand and is contrary to the *Watts* and *Sachs* case.

Inherent in the arbitrary and summary judgment of contempt here imposed is the threat of further punishment by way of disbarment or suspension. If the judgment is permitted to stand, this threat also strikes at the very heart of the right of an accused to the effective "Assistance of Counsel". Not only does the dangerous threat exist of this character, but the trial judge as shown by the record (R. 257) referred all twelve of his charges to the District Court to be used as a basis for the disbarment or suspension of appellant and proceedings looking to this end are now pending in that court. This well illustrates our point that the arbitrary exercise of the contempt power can effectively destroy the office of advocate and deprive the citizen of that fair and impartial trial guaranteed by the Fifth Amendment.

CONCLUSION

A ruling by this Court is essential in the interest of trial judges and trial lawyers. A proper administration of criminal justice requires a ruling on the conduct here involved.

We say if the present modified ruling is permitted to stand and is not reversed that a serious blow will have been struck at the right of an accused in a criminal case to have courageous and effective Assistance of Counsel, as guaranteed by the Sixth Amendment. Moreover, if a summary judgment imposed by a biased judge is permitted to stand against an attorney, a fundamental right, that is, the right to a fair and impartial trial, as guaranteed by the Fifth and Fourteenth Amendments, will have been destroyed. The preservation of the independence of the bar is vital to the due administration of justice and its members should not be subjected to summary contempt judgments, for errors in judgment, when they act in good faith and in the honest belief that their actions are well founded and taken in the interests of their clients. Obviously, an attorney who would refrain from defending the rights of his client because of fear or threats from a trial judge, would be considered quite unworthy of his high commission as a member of the bar and recreant of its honorable tradition of resisting every exercise of tyranny or arbitrary power. *In Re Cottingham, et al.* (Colo.), 182 P. 2, 66 Colo. 335.

WHEREFORE, your petitioner respectfully prays in this petition that this Honorable Court grant a Writ of Certiorari and bring before this Court the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit.

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No. 27

IN THE
Supreme Court of the United States

OCTOBER TERM, 1954

DORSEY K. OFFUTT, An Attorney, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*

**BRIEF FOR PETITIONER ON CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT**

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IN THE
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OCTOBER TERM, 1954

No. 27

DORSEY K. OFFUTT, An Attorney, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*

**BRIEF FOR PETITIONER ON CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT**

Petitioner, Dorsey K. Offutt, is an attorney at law and seeks the reversal of the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit, entered November 19, 1953, modifying a summary contempt judgment entered by Judge Alexander Holtzoff of the United States District Court for the District of Columbia against petitioner and reducing the sentence of imprisonment from ten days to forty-eight hours.

THE OPINIONS BELOW

The United States District Court for the District of Columbia summarily adjudged petitioner in contempt of court and sentenced him to ten days' imprisonment.

The Certificate of the District Court adjudging petitioner in contempt was entered June 16, 1952 (R. 25-29). The opinion of the United States Court of Appeals for the District of Columbia Circuit, modifying the District Court's adjudication of contempt and reducing petitioner's jail sentence from ten days to forty-eight hours, is reported at 208 F. 2d 842 and appears at R. 264-267. The opinion of the Court of Appeals in the case of *Henry L. Peckham, Jr. v. United States of America*, No. 11,487, decided the same day, which is referred to and made a part of the *Offutt* opinion by reference, is reported at 210 F. 2d 693 and appears at R. 269-290.

JURISDICTION

The decision and judgment of the Court of Appeals were entered on November 19, 1953. Petitioner timely filed a Petition for Rehearing (R. 291-302). The Court of Appeals entered an order denying this petition on December 14, 1953 but in that order deleted footnote 1 on page 3 of the original opinion and entered a new footnote 1, having reference to finding 11 of the District Court. The Court of Appeals stayed its mandate pending application to this Court for certiorari (R. 306). On January 13, 1954, this Court extended the time for filing the Petition for Writ of Certiorari to and including February 12, 1954. A petition for certiorari was timely filed on February 12, 1954 and granted by this Court (R. 308). The jurisdiction of this Honorable Court is invoked under the Act of June 5, 1928, 28 U. S. C. A., Sections 1254 and 2101, and Rule 37 of the Federal Rules of Criminal Procedure.

CONSTITUTIONAL PROVISIONS, STATUTE AND RULE INVOLVED

Constitution of the United States:

Article III, Section 2(3)

The trial of all crimes, except in cases of impeachment, shall be by jury; * * *

Fifth Amendment. No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *

Sixth Amendment. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

Title 18, Section 401, U. S. C. A., Chapter 21:

Power of Court:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Federal Rules of Criminal Procedure, Title 18, U. S. C. A.:

Rule 42. Criminal Contempt.

(a) **Summary Disposition.**—A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) **Disposition Upon Notice and Hearing.**—A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice

shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant, or, on application of the United States Attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilty, the court shall enter an order fixing the punishment.

QUESTIONS PRESENTED

The Court of Appeals modified a summary order of contempt of the District Court, sentencing petitioner to jail for ten days and reduced that sentence to forty-eight hours. In reducing the sentence that court held that this was necessary because the trial judge provoked petitioner, showed bias and prejudice and his treatment of petitioner barred the appellate court from sustaining the proceedings below as fair and impartial (R. 266, 281-282).

In reversing the *Peckham* case and in modifying the judgment in the *Offutt* case, the court below held (R. 281-282):

A number of other questions are presented generally. These include claims of degrading and belittling remarks directed at defense counsel by the judge, restrictions upon cross-examination, the judge's assumption of the function of an advocate, lack of impartiality, and prejudicial remarks by the prosecutor. As to the effect of these matters on the fundamental fairness of the trial this court finds itself divided. Judge Edgerton and Judge Bazelon, constituting a majority of the court, are convinced that the excessive injection of the trial judge into the examination of witnesses,

his numerous comments to defense counsel, indicating at times hostility, though under provocation, demonstrated a bias and lack of impartiality which may well have influenced the jury; that, considering these matters and others, examples of which are set forth in an Appendix attached hereto, this court is barred from sustaining the judgment as the product of a fair and impartial trial. This necessitates reversal.

The writer of this opinion feels decidedly that it would have been preferable for the court to have restrained his interruption of the examining process. The Government was well represented and the extent of the judge's participation was not required by his obligation to maintain a firm and salutary control of the proceedings. We have today in No. 11466, *Offutt v. United States*, sustained the contempt conviction of defense counsel due to his conduct in this case but we have reduced the sentence. By sustaining the conviction we have expressed our conclusion that counsel was contemptuous, while in reducing the sentence we have reflected our view that his conduct was not altogether separable from that of the judge in treading the area reserved for counsel, thus creating conflict and engendering remarks and attitudes on the part of both court and counsel which afflicted the trial.

As we read the language of the court below in the light of the examples set forth in the appendix to the *Peckham* opinion (R. 285-290), that court held that petitioner was subjected to great provocation from the trial judge (R. 266), that "degrading and belittling remarks" were "directed to defense counsel" by the judge, that the judge assumed "the function of an advocate" and displayed "lack of impartiality" (R. 281-282). In reversing the *Peckham* case, the court below concluded that these actions of the trial judge and his excessive "injection . . . into the examination of witnesses (and) his numerous comments to defense counsel, indicating at times hostility . . . demonstrated a bias and lack of impartiality . . . " and rendered the trial unfair. The court below concluded that the "treatment of appellant" by the trial judge was the

"chief factor" which led the court below to conclude that neither the conviction of Dr. Peckham nor the sentence of petitioner could stand unmodified (R. 266-267). Against this background we say that the following questions are presented:

1. Whether the biased and prejudiced conduct of the trial judge and his treatment of petitioner precluded that judge from exercising against petitioner the summary power to hold petitioner in contempt of court, provided for in Rule 42(a) of the Federal Rules of Criminal Procedure.

2. Whether the findings of the Court of Appeals in affirming the judgment as modified, which show that the trial judge participated in the trial in such prejudicial fashion as to provoke petitioner to do the things which he did and upon which the modified judgment of contempt now rests, render the modified and summary judgment of contempt void because entered by a judge who was provocative and not impartial, as required by the rulings of this Court in *Cooke v. United States*, 267 U.S. 517, 69 L. Ed. 767, and *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749.

3. Whether a trial judge who has been found by the Court of Appeals to have invaded the area reserved to counsel, who provoked counsel and who has shown hostility, prejudice and a lack of impartiality against petitioner was disqualified to exercise the summary power of contempt provided for in Rule 42(a) because of the decisions of this Court in *Cooke v. United States*, *supra*, and *Tumey v. Ohio*, *supra*.

4. Whether the exercise of summary power of contempt provided for in Rule 42(a), under the circumstances as now found by the Court of Appeals, was appropriate and proper. In this connection it can be assumed that the trial judge had summary power under Rule 42(a) but it should be remembered that the summary judgment of contempt

against petitioner came at the conclusion of the charge to the jury and notwithstanding that the trial judge had ample opportunity to afford petitioner a hearing within the usual conception of the due process of law as required by the Fifth Amendment to the Constitution without impeding or otherwise restricting the trial of the *Peckham* case.

5. Whether under all the circumstances of the case as now decided by the Court of Appeals in the *Offutt* and *Peckham* cases, which must be read together, petitioner was denied due process of law in violation of the Fifth Amendment because the trial judge proceeded summarily and denied petitioner the right to notice, charges, a hearing, including the right to offer evidence in contradiction or mitigation of such charges and to counsel.

6. Whether the exercise of summary power to adjudge an attorney, acting as defense counsel in a criminal case, in contempt exceeds the bounds of fair discretion as applied to those charges of contempt which the Court of Appeals has sustained, when the court below has found that the judge imposing that summary sentence was hostile, prejudiced, not impartial and guilty of provocation.

7. Whether this Court should exercise its power (described in *Sacher v. United States*, 343 U. S. 1, 9, 13) and protect defense counsel in a criminal case in the fearless, vigorous and effective performance of the duties pertaining to the office of advocate against an arbitrary exercise of summary contempt power under Rule 42(a), when the Court of Appeals sustained specifications dealing only with discourteous remarks, repeating questions, asking prejudicial questions of the prosecuting witness in an abortion case and the seeking of a mistrial, where there is no finding either by the trial judge or the Court of Appeals that this specified conduct impeded the trial or obstructed the progress of the trial. In this connection it must be borne in mind that the trial judge did not find, nor did the Court

of Appeals find, that there was a willful intent on the part of petitioner to violate court rulings in doing what he did to protect his client in the trial below, which trial has now been held by the Court of Appeals to be a mistrial mainly because of the conduct of the trial judge. In the absence of bad motives and specific intents, contempt charges in such circumstances summarily imposed upon trial counsel cannot be sustained. *In re Watts and Sacks*, 190 U. S. 1, 32, 35.

8. Whether this Court should protect petitioner in accordance with *Sacher v. United States*, supra, 1, 9, 13, when the record shows that the District Court is conducting proceedings seeking to disbar petitioner from the practice of his profession, predicated in part on the summary findings entered by the trial judge, four of which have been affirmed on appeal, notwithstanding that the trial judge's conduct and the misconduct of the prosecutor were such as to require a modification of the sentence imposed upon petitioner and the reversal of the main action because such conduct was prejudicial and rendered the trial unfair.

STATEMENT OF THE CASE

This case presents for correction errors of the United States District Court for the District of Columbia, erroneously affirmed by the United States Court of Appeals for the District of Columbia Circuit. The case is one of importance. It involves important questions dealing with the rights of a defense counsel not to be deprived of his liberty without due process of law under the Fifth Amendment and of an accused to have effective "Assistance of Counsel" guaranteed him by the Sixth Amendment to the Federal Constitution.

Petitioner, Porsey K. Offutt, is a respected member of the Bar in good standing. On April 4, 1952, an indictment was returned in the United States District Court for the District of Columbia against Dr. Henry L. Peckham, a practicing physician (R. 2). The indictment charged Dr.

Peckham with committing two separate abortions at two different times involving the same complaining witness, a Mrs. Mary Lee Ott (R. 2). On May 23, 1952 petitioner entered his appearance for Dr. Peckham (R. 4). On the same day he appeared in the District Court and argued several preliminary motions. On May 26, 1952 petitioner argued a motion before Chief Judge Laws of the District Court which, among other things, sought a continuance to take the deposition of the mother of the complaining witness. This continuance was denied (R. 41-44). On May 27, 1952 the case was called for trial before Judge Alexander Holtzoff of the District Court and the trial commenced (R. 44). The trial lasted thirteen days. Twenty witnesses testified for the government and ten for the defense. Throughout the trial petitioner was sick, nervous and upset (R. 70, 72, 115). On numerous occasions during the trial, Judge Holtzoff addressed petitioner in a manner obviously upsetting and disconcerting, such as "stupid" (R. 55); "discourteous" (R. 139); "unethical" (R. 139); and with losing his mind (R. 226). Judge Holtzoff also accused petitioner of being "insolent" on many occasions in and out of the presence of the jury (R. 79, 127, 226). The judge threatened to have the marshal pull petitioner to his seat and have him gagged (R. 180, 213, 215) and jailed (R. 81-82). Whenever petitioner asked in what respect he was guilty of misconduct, the judge rebuked him and refused his request for information.

For the first three days of trial relations between the court and petitioner were without serious incident. On June 3, 1952 difficulties commenced, the judge rebuked counsel for his conduct but later expressed the view that petitioner did not intend anything contumacious by his conduct (R. 69). The situation was further strained because the prosecutor made unfair prejudicial statements regarding petitioner (R. 70, 88, 105, 127, 128, 137, 138, 179, 180, 218). On one occasion, in the presence of the jury, the prosecutor stated that petitioner had threatened to punch him in the nose (R. 45-46). In no instance did the judge

rebuke or admonish the prosecutor for his misconduct (R. 287-290). Yet the record is replete with numerous instances of colloquy between the judge and petitioner wherein the judge rebuked and chastized petitioner, even in the presence of the jury, and subjected petitioner to great provocation (R. 266-267, 285, 290).

On June 16, 1952 the judge delivered his charge to the jury. Immediately thereafter, but before the jury returned its verdict, the judge summarily adjudged petitioner guilty of criminal contempt of court, within the meaning of Rule 42(a) of the Federal Rules of Criminal Procedure, for petitioner's conduct during the trial, sentenced him to ten days in jail and forthwith committed him (R. 22).

No hearing was afforded petitioner. He was denied any right of defense, any right of explanation and the right even to consult counsel (R. 257-258). Petitioner attempted to deny guilt and requested a stay for a short time to consult counsel. This was denied. Petitioner's associate counsel sought to be heard. His request likewise was denied (R. 259). Petitioner was forthwith taken into custody by the marshal and removed from the courtroom, notwithstanding that the verdict of the jury had not yet been returned. After the petitioner had been committed, a copy of the specifications of contempt and the order thereon were delivered by the judge to associate counsel for Dr. Peckham (R. 256-258). The specifications of contempt consisted of twelve main findings alleging different contempts (R. 25-29). By actual count, excluding the general contempt citation, the specific instances of alleged contemptuous conduct upon which the judge relied were sixty-eight in number (R. 25-29). On the same day petitioner filed a written motion for bail, which was summarily denied by the judge without argument (R. 32-33). Petitioner perfected his appeal to the United States Court of Appeals for the District of Columbia Circuit on the day of his commitment (R. 22-24). An immediate appeal was necessary because of the arbitrary denial of bail. This meant that petitioner's sentence would be carried out and he would have been deprived of any appeal contrary to

St. Pierre v. United States, 319 U. S. 41, 63 S. Ct. 910, 87 L. Ed. 1198, and *Sacher v. United States*, 343 U. S. 1, 72 S. Ct. 451.

On the evening of June 16, 1952, the day petitioner was committed, the Court of Appeals granted bail on appeal. Petitioner is at liberty on bail (R. 46-41).

Because of the importance of the questions involved, the Court of Appeals granted the parties permission to file briefs in excess of fifty pages and granted additional time for argument. On November 19, 1953 the Court of Appeals reversed findings 3, 4, 5, 7, 8, 9, 10 and 11 and affirmed findings 1, 2, 6 and 12 (R. 266-267). Because of this modification of the contempt findings the Court of Appeals concluded that the record did not support the penalty imposed and on the authority of *United States v. United Mine Workers of America*, 330 U. S. 258, 304, and *Rosenfeld v. United States*, 167 F. 2d 222, 223 (4 Cir.), unanimously concluded that petitioner's sentence should be reduced from ten days to forty-eight hours. Findings 1, 2, 6 and 12 of the trial judge, which the Court of Appeals erroneously affirmed, may be summarized as findings that petitioner was (1) discourteous to the court, (2) repeated questions, some of which were intended to besmirch a witness, (6) asked prejudicial questions of the prosecuting witness without foundation and (12) tried to create an episode which might lead to a mistrial (R. 26, 27, 28). The Court of Appeals affirmed the summary judgment of contempt based on these remaining four findings, notwithstanding that petitioner's "conduct cannot fairly be considered apart from that of the trial judge" (R. 266). The reasoning of the court below was that petitioner suffered "great provocation" from the trial judge (R. 266). Accordingly, that court concluded (R. 266-267):

The judge's treatment of appellant, examples of which are included in an appendix to our opinion in *Peckham v. United States*, decided today, and which is the chief factor in leading a majority of this court to conclude that Peckham's conviction cannot stand,

leads us all to conclude that appellant's sentence should be reduced from 10 days to 48 hours.

Notwithstanding that the Court of Appeals was of the opinion that the judge's treatment of appellant was the "chief factor" in causing the court to reverse the *Peckham* case and to reduce petitioner's sentence, the court below permitted four findings of contempt to stand, even though those findings were made by a judge who subjected petitioner to "great provocation" (R. 266) and who was affirmatively found by the Court of Appeals to have showed a lack of impartiality, hostility and bias against both petitioner and his client. The Court of Appeals also found that the prosecutor below was guilty of prejudicial misconduct (R. 281-282). Thus, we have a situation involving a hotly contested and highly controversial trial which resulted in an unfair trial, principally because of the conduct of the trial judge, and contributed to by misconduct of the prosecutor. The trial judge was personally involved and invaded the area reserved to counsel, thus creating the conflict which arose in the trial and out of which the abortive contempt citation grew (R. 266-267, 281-282). Notwithstanding that eight of the twelve grounds upon which the contempt citation rested were reversed, the court below ordered that petitioner be sentenced to jail for forty-eight hours even though, as the court below held, (R. 266) petitioner's "conduct cannot fairly be considered apart from that of the trial judge."

As we are of the view that this Court has held that contested criminal cases must be supervised and controlled only by a "neutral judge" (*Sacher v. United States*, 343 U. S. 1, 8) and where the right of counsel to vigorously defend his client is infringed by a judge, counsel will be protected (*Sacher v. United States*, supra, 9, 13) a Petition for Rehearing was filed below (R. 291-302). In that petition we pointed out that, while the proper respect is due the Bench, this Court's warning in the *Sacher* case that both judges and lawyers are human and both are heirs to

all the weaknesses of the human flesh should be borne in mind. We contended, because the conduct of counsel could not be separated from the misconduct of the judge and the prosecutor, that the ends of justice would be served if appellant's sentence was reduced to a fine or suspended in the event the court below did not feel as we did, that the sentence in toto should be voided. While the court modified its opinion, in accordance with the first prayer of our petition, it refused to further modify its judgment of November 19, 1953 and permitted a jail sentence against petitioner to stand, even though imposed summarily and without a hearing by a biased and prejudiced judge who invaded the area reserved to counsel, provoked counsel and by his conduct deprived petitioner's client of a fair and impartial trial.

As we read Rule 42 of the Federal Rules of Criminal Procedure, existing legislation and the applicable decisions of this Court, summary punishment cannot be imposed upon an attorney acting in the defense of a criminal case by a biased and prejudiced judge, who has invaded the area reserved to counsel and who became so personally involved in the trial that petitioner's conduct cannot be considered apart from that of the judge. In such a situation an attorney is entitled at the very least to a hearing by another judge. Rule 42(b), F.R.C.P., *Cooke v. United States*, 267 U. S. 517, 69 L. Ed. 767.

As this situation is important, not only to petitioner but to all trial attorneys, this Court should correct the manifest injustice involved in the ruling below, which jails an attorney for contempt, notwithstanding that it has been found by the Court of Appeals that the alleged contemptuous situation arose through improper actions of the trial judge and the prosecutor.

ARGUMENT

I.

In its decision the court below, after reversing the findings of the trial judge numbered 3, 4, 5, 7, 8, 9, 10 and 11, held (R. 266) that the record "does not support the penalty imposed" because the appellant's conduct "cannot be considered apart from that of the trial judge." The reasoning of the court below, among other things, was that petitioner suffered "great provocation" from the trial judge. Yet, instead of reversing the summary judgment of contempt imposed by the trial judge, the court below reduced the sentence of ten days to 48 hours. We submit that the summary judgment under the facts as now determined by the Court of Appeals should have been reversed in its entirety. The court below reviewed the actions of the trial judge and as we read that review (R. 266, 281-282) concluded that petitioner was subjected to "great provocation," "degrading and belittling remarks" and that the trial judge in doing what he did assumed "the function of an advocate" and displayed lack of impartiality, hostility and bias. The situation was further complicated to petitioner's prejudice because of the misconduct of the prosecutor (R. 281-282, 287-290). The court below pinpointed its condemnation of the trial judge by holding that his "treatment of appellant" (petitioner) was the "chief factor" in causing that court to reverse the *Peckham* trial and reduce petitioner's sentence. Where it has been determined on appeal that the trial judge was guilty of "provocation", "hostility", "bias" and "lack of impartiality" and sanctioned misconduct of the prosecutor and thereby deprived petitioner's client of a fair and impartial trial and *invaded the area reserved to counsel*, thus creating conflict, we submit that the principles announced by this Court in *Cooke v. United States*, 267 U. S. 517, 539, and *Tumey v. Ohio*, 273 U. S. 510, should be applied and the modified summary judgment of contempt entered below should be reversed in its entirety.

Our contention is supported by the Advisory Committee Notes pertaining to Rule 42(b) of the Federal Rules of Criminal Procedure, 18 U. S. C. A., page 495, Note 4, which state:

that the provision in the sixth sentence disqualifying the judge affected by the contempt if the charge involves disrespect to or criticism of him is based, in part, on " * * * and the observations of Chief Justice Taft in: *Cooke v. United States*, 45 S. Ct. 390, 267 U. S. 517, 539; 69 L. Ed. 767.

As the Court of Appeals has found that the trial judge was provocative and biased the four remaining findings should not have been upheld on appeal.

Moreover, the decision below which now upholds a judgment entered by a trial judge found by the Court of Appeals to be biased and prejudiced, is contrary to an earlier decision of the same court. *Whitaker v. McLean*, 73 App. D. C. 259, 118 F. 2d 596.

The existence of the power to punish summarily for contempt does not mean that it is always appropriate to use it. *Cooke v. United States*, supra. This summary power should never be used where the trial judge is personally involved, shows hostility and bias and invades the area reserved to counsel in such fashion as to render the trial unfair. The employment of summary power to adjudge a lawyer in contempt seems inherently to involve the basic thought that the judge exercising such arbitrary power should be free from fault and should be precisely correct in his conduct. After all, the judge and the lawyer are both human and are both officers of the court. As this Court properly pointed out in *Sacher v. United States*, 343 U. S. 1, 8, there is strife in the trial of a contested criminal case, hence the supervision and control over counsel must be exercised only "by a neutral judge." In the *Sacher* case, this Court made it clear, where the "vigorous" "performance" of counsel brings him in conflict with the trial judge and where the area reserved to counsel is infringed by the trial judge,

that counsel will be protected in every duty of an advocate against the exercise of summary contempt power. Thus, this Court in the *Sacher* case held (p. 9):

Of course, it is the right of counsel for every litigant to press his claim, even if it appears far-fetched and untenable, to obtain the court's considered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts.

and (p. 13):

But that there may be no misunderstanding, we make clear that this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever.

It seems to us that the conflict below arose in part because of certain philosophies held by Judge Holtzoff on how courtroom procedures should be expedited. In a recent address delivered on April 6, 1953 before the Philadelphia Regional Chapter of the American Society for Public Administration, University of Pennsylvania (14 F. R. D., pp. 323-330), our judge opened his speech with a disparaging statement that "the legal profession is now conscious of its own frailties," and quoted the lines of Gilbert spoken by the Lord Chancellor in "Iolanthe" (p. 323):

The Law is the true embodiment
Of everything that's excellent.
It has no kind of fault or flaw
And I, my Lords, embody the Law.

Our judge then urged the streamlining of cases for trial, that jurors should be examined on the voir dire by the judge alone and stated that the judge himself could select a jury in a criminal case in an hour or less and in routine civil or criminal cases in less than ten minutes and rarely

more than twenty minutes. The judge stated his philosophy of expediting trials to be as follows (p. 326-327):

Other means of expediting a trial involve the constant and continuous exercise of firm control by the judge. Too often, in State courts particularly, he is regarded as a mere moderator or chairman. This is not the wholesome common law concept. The judge should participate in the trial and regulate its course. He should not permit it to leave its proper channel. He has the right to exclude of his own motion all immaterial and irrelevant evidence and confine the trial to the issues to be determined.

Judge Holtzoff further stated (p. 327) "the court is clothed with power . . . to curb" counsel's interrogation of witnesses and contended that prolonged examinations caused departures, tangents and side issues which distract juries. We submit that the application of these principles to some extent caused the judge below to invade the area reserved for counsel as found by the court below (R. 282), and caused the conflict between the judge and the petitioner. Now that the court below has further found that the judge's treatment of petitioner showed bias, hostility and a lack of impartiality, the summary judgment imposed by him against petitioner should not be permitted to stand. We, of course, realize that the dignity of the Bench must be upheld, but as this Court warned in the *Sacher* case, judges too are heirs to all of the weaknesses of the human flesh and where a judge by his conduct provokes incidents, invades the lawyer's field and creates strife, it does not seem fair to us that, under such circumstances, an attorney endeavoring to carry out the duties of an advocate as best he can in order to afford the effective "Assistance of Counsel" guaranteed an accused by the Sixth Amendment to our Constitution, should be held in contempt if he fights back and attempts to meet such conduct on the battlefield of the judge's choosing, the open court. The ends of justice in such an instance would be best served by constructive and instructive language of an appellate court's

opinion rather than by the one-sided imposition of imprisonment upon defense counsel alone.

The decision below has erroneously decided questions of vital importance to courts and trial counsel alike contrary to *Cooke v. United States*, supra, *Tumey v. Ohio*, supra, and *Whitaker v. McLean*, supra, sanctions a departure from the accepted and usual course of judicial proceedings concerning contempt powers and should be reversed by this Court in the public interest and in the aid of the proper administration of criminal justice.

II.

It has long been a fundamental concept of American jurisprudence that the judge who presides over civil and criminal cases should be fair, unbiased and completely impartial. Any bias, hostility or prejudice, or even interest in the outcome of a given civil or criminal case will disqualify a judge from presiding over that case. *Tumey v. Ohio*, 273 U. S. 510, 47 S. Ct. 437, 71 L. Ed. 749.

In the *Tumey* case in ruling that the presiding judge in a judicial proceeding in our country under either the Fifth or Fourteenth Amendments must be impartial and in defining the term "due process of law" this Court said (p. 535) due process requires that the presiding judge be impartial and if that judge is not impartial he is disqualified to enter any judgment thereafter in the proceedings. Thus, this Court said in reversing a judgment imposed by an Ohio judge (p. 535):

It is finally argued that the evidence shows clearly that the defendant was guilty and that he was only fined \$100, which was the minimum amount, and therefore that he can not complain of a lack of due process, either in his conviction or in the amount of the judgment. The plea was not guilty and he was convicted. No matter what the evidence was against him, he had the right to have an impartial judge. He seasonably raised the objection and was entitled to halt the trial because of the disqualification of the judge * * *.

To affirm a judgment of conviction imposed by a judge whom the Court of Appeals found to be biased, prejudiced and not impartial is contrary to the national solicitude that our tribunals shall not only be impartial to controversies submitted to them, but shall give assurance that they are impartial and free from any bias or prejudice that might disturb the normal course of impartial judgment. *Berger v. United States*, 255 U. S. 22, 35, 36, 41 S. Ct. 230, 65 L. Ed. 481.

Where bias or prejudice is shown on the part of the presiding judge, it is the duty of that judge to proceed no further in the case and not to enter a final judgment. As our Court of Appeals has found the trial judge here was biased and prejudiced and lacked impartiality, it follows, even under Rule 42(a), that he could not proceed further. He certainly could not enter a summary judgment of contempt because being biased that judgment would not be impartial. The court below has applied the principles of the *Berger* case to bias arising during the course of a trial. *Whitaker v. McLean*, 73 App. D. C. 259, 118 F. 2d 596.

In the *Whitaker* case the court below reversed the action of the trial judge because it appeared in a colloquy with counsel during the trial, occurring in the absence of the jury, that the trial judge made certain remarks which caused plaintiff's counsel to express the opinion that he could not very well go on because the judge's remark evidenced bias and prejudice. Nevertheless, at the conclusion of this bench colloquy the trial proceeded. At the close of the testimony the trial judge directed a verdict for the defendant. In reversing this case, our Court of Appeals said (p. 596-597):

The judge may, as indeed he insisted, have felt no hostility to the plaintiff, and in that view he was subjectively free from bias. But bias must be considered objectively. Few, if any, judges would make the reported remarks, in the course of a trial unless they had developed definite and positive hostility to the plaintiff and his case. Hostility is a form of bias.

When a judge has shown bias before trial, Section 21 of the Judicial Code, 28 U. S. Code Annotated, Sec. 25 provides means of disqualifying him. The policy underlying Sec. 21 in the Courts of the United States 'shall not only be impartial in controversies submitted to them but shall give assurance that they are impartial;' i.e. shall appear to be impartial. *Berger v. United States*, 255 U. S. 22, 36; 41 S. Ct. 230, 235;

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A bias which develops during the trial and 'is grounded on the evidence' has been held not to be within the terms of Section 21. * * * Often some degree of bias develops inevitably during the trial. Judges can not be forbidden to feel sympathy or aversion for one party or the other. Mild expressions of feeling are as hard to avoid as the feeling itself. But a right to be tried by a judge who is reasonably free from bias is part of the fundamental right to a fair trial. If, before a case is over, a judge's bias appears to have become overpowering we think it disqualifies him.

The action of the court below in permitting a summary judgment of contempt to stand when that court has found that the trial judge who imposed the sentence was guilty of bias, hostility and a lack of impartiality, is contrary to the rulings of this Court in the *Tumey* and *Berger* cases and to the decision of the court below in the *Whitaker* case and is a denial of due process of law guaranteed to petitioner under the Fifth Amendment. Even if we assume the existence of the summary power to adjudge an attorney in contempt, under the circumstances which the Court of Appeals below has found to exist in affirming in part the summary contempt judgment here involved, we question whether it is appropriate to permit such a judgment to stand and these circumstances are sufficient to disqualify the trial judge from exercising the summary provisions of Rule 42(a).

Nor was it appropriate under our circumstances, even if the trial judge was qualified to act, which is denied, to ex-

ercise the summary power of contempt provided for in Rule 42(a). The summary judgment attempted to be imposed by the trial judge came at the conclusion of the charge to the jury (R. 256). The trial judge had full opportunity to afford petitioner a hearing within the usual conceptions of due process of law as required by the Fifth Amendment. This procedure would not have impeded or obstructed the trial of the *Peckham* case. While summary contempt proceedings are authorized by Rule 42(a), we submit that the theory behind them is to "enforce obedience and order in the court and not to impose unconditional criminal punishment." *Sacher v. United States*, 343 U. S. 1, 22 (Dis. Op. J. Black), 29 (Dis. Op. J. Frankfurter).

In *In re Oliver*, 333 U. S. 257, 92 L. Ed. 682, this Court squarely held (pp. 274, 275) that the only time when the exercise of the "extraordinary but narrowly limited power to punish for contempt" by way of a summary proceeding is authorized and the "due process" requirements can be ignored is where "charges of misconduct" occur "in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court and where immediate punishment is essential to prevent 'demoralization of the court's authority' before the public."

When the need of preserving obedience has passed, there is no need to punish an alleged contempt in a summary manner and it should be dealt with as the law deals with other illegal and criminal acts (*Toledo Newspaper Co. v. United States*, 247 U. S. 402, 425-426) because summary power is "capable of grave abuses" and is limited in exercise to "the least possible power adequate to the end proposed." *In re Oliver*, supra, 274.

Article III, Section 2 of our Constitution requires that the trial of all crimes shall be by jury. Contempt proceedings are criminal prosecutions brought to punish public wrongs. While there are unusual instances in which

this Court has upheld summary proceedings in contempt cases, nevertheless this Court has made it clear that such a proceeding should be used only if necessary to preserve order in the court or to prevent interference with the court's processes or business. Recent decisions of this Court have expressed caution in the exercise of summary contempt power. *Michaelson v. United States*, 266 U. S. 42; *Nye v. United States*, 313 U. S. 33; *Cooke v. United States*, 267 U. S. 517.

If summary proceedings are to be indulged in at the whim of a judge, particularly if that judge by his conduct has shown bias and prejudice against an attorney, the judiciary will have power to sentence and confine citizens of the United States without even the semblance of a hearing or any of the steps which have been considered necessary in a criminal case. Moreover, to permit a biased judge to so act would be tyrannical, oppressive and wrong. *Hovey v. Elliott*, 167 U. S. 409, 17 S. Ct. 841, 42 L. Ed. 215.

The warnings which this Court announced in 1897 in the *Hovey* case are peculiarly applicable and timely today. In condemning the exercise of the contempt power by a court of the District of Columbia, this Court held (p. 413):

The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.

As this Court so pointedly said in the *Hovey* case, a sentence pronounced without an opportunity and without the right of defense generally is not entitled to the respect of any tribunal and to commit a person without a hearing, except under the extraordinary exceptions approved by this Court to protect the court itself, would be a most

flagrant violation of the rights of the citizen and could convert the judiciary into an engine of oppression capable of destroying great constitutional safeguards.

In the instant case no need was shown for the exercise of the summary power of contempt and its exercise was oppressive and the wrongful culmination of the invasion by the trial judge of that area reserved to counsel, who was duty bound to give fearless and effective "Assistance of Counsel" to his client as required by the Sixth Amendment. *Johnson v. Zerbst*, 304 U. S. 458, *Powell v. Alabama*, 287 U. S. 45.

III.

The trial judge in taking the action he did and in sentencing petitioner to jail denied the petitioner the right to notice, charges, a hearing, including the right to offer evidence in contradiction or mitigation of such charges and the right to counsel. The summary contempt power of its very nature is subject to being exercised arbitrarily and in a fashion which will deprive an accused of all of the safeguards of due process of law as guaranteed by the Fifth Amendment. This contempt power should be narrowly restricted and when used it should only be in cases of contempts occurring in the actual presence of the court which are willful and which if not immediately suppressed will disturb the court's business or interfere with the processes of the court. *Cooke v. United States*, *supra*.

When all of these elements are not present, the summary contempt power should not be used. The provisions of Rule 42(a) are permissive and do not require that all contempts occurring in the presence of the court be proceeded with summarily.

As the trial judge did not find in the four findings which were sustained on appeal, and as the appellate court likewise did not find in affirming these four findings that appellant's conduct obstructed the course of justice in some way and was done wilfully and with bad motives, the findings are void (*In re Watts and Sacks*, 190 U. S. 1, 32) and

did not have been entered summarily. To give findings was both an inappropriate summary power of contempt and exceeded discretion. In no event could a biased judge summary proceedings and enter judgment, *supra*; *Whitaker v. McLean*, *supra*.

IV.

As in *Sacher v. United States*, 343 U. S. 1, I protest defense counsel in a criminal case, vigorous and effective performance of going to the office of an advocate against abuse of summary contempt power under say this is an appropriate case for the power of protection. The specifications of counsel by the Court of Appeals were imposed on trial judge and now relate to discourteous questions, asking prejudicial questions of witness in an abortion case and the seek-

Neither the trial judge nor the Court of Appeals found there was a wrongful intent on the part of counsel for Dr. Peckham to violate court rules, what he considered to be his duty to prosecute the controversial trial below. Moreover, it has been held by the Court of Appeals to affirm the trial, mainly because of the misconduct of counsel and his display of bias and prejudice during testimony. Concerning the affirmed findings of specific intents must be proven and found true before contempt charges can be upheld, entered, which is not the situation here.

Id., 180 U. S. 1, 32, 35.

The record does not support finding 1 that discourteous to the trial judge when we view the measure it against the prejudicial conduct of counsel and the prosecuting attorney. The improprieties the trial court complains were attempts

made on the part of petitioner to have the record reflect personal mannerisms and tones of voice of the trial judge which petitioner considered were prejudicial to his client and improper (R. 74-79, 81-82, 113-114, 146, 154-155, 157-158, 177-179, 195-196, 209-210, 221-222).

The court below has held in other cases involving the same trial judge that counsel have the right to have the record reflect the personal mannerisms and personal conduct of that judge, if counsel deem such conduct prejudicial, as the conduct would otherwise not appear of record *Butler v. United States*, 88 U. S. App. D. C. 140, 188 F. 2d 24; *Bulleci v. United States*, 87 U. S. App. D. C. 274, 184 F. 2d 394; *Vinci v. United States*, 81 U. S. App. D. C. 386, 159 F. 2d 777.

In this respect the record will show that petitioner's objections were made in a respectful manner and that the trial judge, because of his sensitivity in his personal behavior, never denied the improper conduct charged to him by petitioner, but considered petitioner's efforts to have the record reflect that conduct as insolent and contemptuous. Petitioner's actions in noting his objections to the trial judge's conduct cannot be considered contempt, if the decisions of the court below in the *Butler*, *Bulleci* and *Vinci* cases mean what they state.

The ruling of the trial judge (finding 2) which has been affirmed by the court below that the repeating of questions constitutes contempt is contrary to *Caldwell v. United States* (C.C.A. 9), 28 F. 2d 684; *Harris v. H. W. Gossard Co.*, 185 N. Y. Supp. 861, 194 App. Div. 688; and *Bennett v. Superior Court in and for San Diego County (Calif.)* 222 P. 2d 876.

The ruling of the trial judge (finding 6), which also has been affirmed by the court below, that questions of counsel directed to Mary Ott, the prosecuting witness, were contemptuous because those questions tended to besmirch her, is not supported by the record. Mary Ott was the complaining witness under both counts of the indictment which

charged two separate abortions. The evidence showed that she had lived in adultery with her paramour, had led an immoral life and had been involved in prior and earlier abortions. It was the ruling of the trial judge that these earlier events and her living with other men while she was married was not admissible and it was petitioner's effort to get these facts into the record that are now treated as contemptuous and besmirching the prosecuting witness. A part of the defense was that there was a strong hypothesis that one of the abortions charged in the indictment could have been committed by the prosecuting witness upon herself. Her denial that she committed the abortion should not have foreclosed counsel's cross-examination to bring before the jury these facts and the moral character of this woman. It must be remembered that the defendant, Dr. Peckham, denied committing the abortion charged. It was consistent with this defense that the witness herself was not only capable of committing the abortion but she had previous experiences with abortions. Moreover, the evidence was admissible on credibility. The court below has so ruled. *Thompson v. United States*, 30 App. D. C. 352, 12 Ann. Cas. 1004.

Meretricious relationships of witnesses may be shown in a criminal case as they affect morals, hence credibility, and show such witnesses in their true light. Questions to this end are proper and do not "besmirch" a witness, and this Court has so held. *Aiford v. United States*, 282 U. S. 687, 692, 51 S. Ct. 218, 75 L. Ed. 736; *Tla Koo-yel-lee v. United States*, 167 U. S. 274, 17 S. Ct. 855, 42 L. Ed. 166. Even the trial judge here involved has so ruled in the prosecutor's favor. *United States v. Edmonds*, 63 F. Supp. 968, 973.

Petitioner as defense counsel for the accused was duty bound to raise these questions concerning the prosecutor's chief witness and to obtain a ruling of the trial court thereon in order to preserve his contentions for appeal. Counsel was doing no more than this in asking the ques-

tions which he did and as the trial judge and the court below have failed to find that the questions asked by petitioner were willful and intentional violations of existing court orders, this finding is abortive and void. *In re Watts and Sachs*, 190 U. S. 1, 32, 35.

With respect to finding 12 of the trial judge that petitioner sought to provoke a mistrial, the Court of Appeals has now found that the trial below was a mistrial because of the improper conduct of the trial judge. In such a situation we do not see how, because counsel insisted throughout the trial that the judge's conduct had caused a mistrial, these actions can be treated as contempt. It seems anomalous to us when it is now admitted that appellant's motions to have a juror withdrawn and a mistrial declared were well taken, that he should now be held in contempt because he pressed this valid contention during the trial.

Finally, insofar as the four findings are concerned which the Court of Appeals has permitted to stand, as motives, intents and purposes are necessarily involved in each of these findings, petitioner should have been afforded the opportunity to testify and defend his motives, intents and purpose both by way of defense and by way of mitigation. *Cooke v. United States*, supra; *Bowles v. United States*, 50 F. 2d 848, 850.

As no hearing was afforded and no evidence was taken concerning appellant's motives, intents and purposes, the judgment below is abortive and invalid as modified because based upon an incomplete and improper record. *Ohio Bell Telephone Co. v. Commission*, 301 U. S. 292.

And even if the remaining findings had found deliberate intent and willful misconduct, which they do not, the record would not support any such findings. The trial judge below on numerous occasions has specifically found throughout the trial that the conduct which resulted in his certificate was not done in bad faith and was not done intentionally by petitioner. Thus, at R. 69 petitioner stated to the judge when he was accused of being belligerent and

insolent that he did not mean to be so, whereupon the judge replied, "I am sure you didn't, but still let it not be done." This is an important ruling because the judge was dealing with many "breaches of my rule" by petitioner (R. 68). At R. 70, when the judge objected to the mannerisms of petitioner and insisted that he must be calm and courteous, petitioner replied, "I mean to be courteous at all times, your Honor," whereupon the judge replied, "No you haven't, you may not be conscious of it." Again at R. 73 when the judge below discussed the tone of petitioner's voice "on several occasions" as being "somewhat belligerent" the judge stated, "And I would say you probably didn't intend it as such." And, at R. 89, after petitioner objected to the witness Ott's signaling answers to her mother (R. 88), the judge below suggested that petitioner was acting in an "excitable and in a boisterous manner," whereupon petitioner stated, "I did not mean to be boisterous." The judge said, "I assume that you didn't mean that * * *." Later in the trial (R. 153) when petitioner was endeavoring to establish through cross-examination of Christianson, a felon, the paramour of Mrs. Ott and the cause of her pregnancy, that he participated in the crime of abortion and was an accomplice, the judge suggested to petitioner that he should treat such a witness with a "little more courtesy." Petitioner thereupon assured the judge that he was being firm with the witness but he was entitled to get answers to his questions, that he was not discourteous and that he was speaking in a courteous tone, whereupon the judge said (R. 153) "You have a right to be firm." Thus, we submit that the trial judge has specifically found and ruled throughout the trial that appellant in doing what he did, did not mean to be contemptuous, did not mean to be boisterous, intended no discourtesy and had a right to be firm. How in such circumstances appellant can now be adjudged in contempt for these very situations is difficult for us to understand and is contrary to the *Watts and Sachs* case.

Another aspect of this case gives us grave concern. Inherent in the arbitrary and summary judgment of contempt here imposed is the threat of further punishment by way of disbarment or suspension. If the modified judgment is permitted to stand, it threatens and strikes at the very heart of the right of an accused to the effective "Assistance of Counsel". Not only does this dangerous threat exist but the trial judge as shown by the record (R. 257) referred all twelve of his findings to the District Court to be used as a basis for the disbarment or suspension of appellant and proceedings looking to this end are now pending in that court. This well illustrates our point that the arbitrary exercise of the contempt power can effectively destroy the office of advocate and deprive the citizen of that fair and impartial trial guaranteed by the Fifth and Fourteenth Amendments.

CONCLUSION

A reversal of the ruling below by this Court is essential in the interest of trial judges and trial lawyers. The proper administration of criminal justice requires this. We say if the present modified ruling is permitted to stand and is not reversed that a serious blow will have been struck at the right of an accused in a criminal case to have courageous and effective Assistance of Counsel, as guaranteed by the Sixth Amendment. Moreover, if a summary judgment imposed by a biased judge is permitted to stand against an attorney, a fundamental right, that is, the right to a fair and impartial trial, presided over by a judge free from bias as guaranteed by the Fifth and Fourteenth Amendments, will have been destroyed. The preservation of the independence of the bar is vital to the due administration of justice and its members should not be subjected to summary contempt judgments, for errors in judgment, when they act in good faith and in the honest belief that their actions are well founded and taken in the interests of their clients. Obviously, an attorney who would refrain

from defending the rights of his client because of fear or threats from a trial judge, would be considered quite unworthy of his high commission as a member of the bar and recreant of its honorable tradition of resisting every exercise of tyranny or arbitrary power. *In Re Cottingham, et al.* (Colo.), 182 P. 2, 66 Colo. 335.

WHEREFORE, we respectfully submit that the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit should be reversed, the four remaining findings nulled and petitioner should be discharged.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1954

DORSEY K. OFFUTT, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for
the District of Columbia Circuit.

REPLY BRIEF FOR PETITIONER.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1954

No. 27

DORSEY K. OFFUTT, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

**On Writ of Certiorari to the United States Court of Appeals for
the District of Columbia Circuit.**

REPLY BRIEF FOR PETITIONER.

Petitioner contends that the serious constitutional questions presented in his Brief required a more open and candid treatment than that afforded in respondent's Brief. A reply is deemed essential to a proper presentation to this Honorable Court of the grave issues involved and upon which the independence of the Bar and the freedom and reputation of petitioner, a respected member of the Bar, depend.

REPLY TO RESPONDENT'S QUESTIONS PRESENTED.

Respondent under "Questions Presented" reverses their proper order and under question 1 deals first with whether the incidents upon which the trial judge relied were contempt of court. In other words, respondent deals with the merits first and then discusses the jurisdictional constitutional question involved. We submit that the jurisdictional question, *i.e.*, whether as a part of the due process of law a biased and prejudiced judge can impose against an attorney a summary sentence of contempt is the first question to be resolved in this case. We think that the restating of the questions presented in respondent's Brief and the intermingling of jurisdictional questions with the merits are not helpful, are confusing and require a full discussion by us of the events relied upon by respondent *in context* if justice is to be done petitioner. For the convenience of the Court we will answer respondent's Brief in its order of presentation.

REPLY TO RESPONDENT'S STATEMENT.

A. This section of respondent's Brief (Br. 4-6) restates a few of the facts which are stated in detail in our Brief (pp. 8-11). It points out just as we have pointed out that Judge Holtzoff at the conclusion of the trial but before the jury's verdict summarily sentenced petitioner for contempt and enumerated twelve main specifications in support of this sentence.

Respondent then states (Br. 5-6) that the trial was punctuated by numberless incidents on the part of petitioner which led him to be continuously admonished and reprimanded by the judge. We respectfully request that each citation on page 6 of respondent's Brief be read in context. This reading will show that in every cited incident petitioner interposed his objections or made his motions respectfully. In some of the incidents he sought the right to approach the bench before asking questions in order that he would not offend against any previous ruling of the

judge (R. 224). When such a request was denied and petitioner was instructed to proceed (R. 224-225), petitioner followed the judge's instructions and put his questions to the witness. On many of the cited occasions the judge acted in an excitable and angry manner, interposed objections *sua sponte* and arbitrarily refused proffers of proof (R. 226-228). In making many of his rulings the judge raised his voice unnecessarily, engaged in prejudicial personal gestures and used unrestrained and abusive language against petitioner. In each instance where petitioner attempted to have the record reflect personal mannerisms of the judge, the judge considered the *making* of the objections as insolent or stupid and even accused petitioner of losing his mind (R. 226). We respectfully ask that this Court compare the courteous and restrained conduct of the petitioner and his words with the conduct and words of the judge in every instance relied upon by respondent (Br. 6).

Respondent states (Br. 6) that petitioner was given repeated warnings that his conduct was inviting punishment for contempt and cites R. 81, 88, 142 and 180. As respondent deems these instances important, we will discuss them as they occurred.

At R. 81 petitioner was examining the mother of the prosecutrix out of turn. During the course of this examination he noticed that the judge raised his hand and leaned forward and looked at the prosecutor, thereby indicating to petitioner that the judge was signaling to the prosecutor that he interpose an objection (R. 81). When this occurred and the prosecutor objected without stating any grounds for his objection, the judge immediately sustained the objection. In order that the record might show this conduct on the part of the judge, petitioner made the following objection:

Mr. Offutt: If Your Honor please, I object to Your Honor raising your hand and leaning forward and looking at the District Attorney before he makes an objection.

immediately summoned petitioner to the bench and he considered the making of this objection "and warned him that if he persisted he would send petitioner to jail for contempt (R. 81). In any event, there might be no dispute in the record as to the statement contained in petitioner's objection to the judge's conduct, petitioner respectfully addressed this to the judge:

"Your Honor do that!

denying the charge or clarifying the factual situation petitioner had made for the record, the judge

has no right to address questions to the court. In kindness to you I am warning you that if you continue in your unethical and discourteous conduct, I shall send you to jail at the end of the trial. I shall send you to jail.

Petitioner in a courteous manner informed the judge that he meant no discourtesy but that he was describing the judge's remarks in the record in accordance with the decision of Judge Stephens of our Court of Appeals in *United States v. United States*, 188 F. 2d 24; *Billeci v. United States*, 184 F. 2d 394 and *Vinci v. United States*, 187 F. 2d 7, which cases uphold the right of counsel in the Court of Columbia to state in the record this particular judge's personal mannerisms when counsel believes such mannerisms prejudicial. This instance illustrates the attention that the judge here was very sensitive to his personal conduct and in every instance in the record where such an objection is made for the judge did not question the accuracy of the statements involved in the objection or motion for a contempt. He treated the making of the objection or motion as contemptuous. Petitioner's conduct in this instance is neither insolent nor contemptuous and

is in accordance with the rights of defense counsel as they are defined in the *Butler*, *Bulleci* and *Vinci* cases.

At R. 88 petitioner objected to the prosecutrix, who was sitting in the front row of the court, signaling to her mother, who was being examined by petitioner, by the nodding of her head to her mother. We submit that a criminal trial would be a farce if the prosecuting witness is to be permitted to sit in the front row of the court and signal answers to a witness on the stand. When that situation occurs, as it did in the trial below, it was the duty of petitioner to bring that situation to the attention of the judge, which he did. Instead of the judge admonishing the prosecutrix and instructing her not to signal answers to her mother, the judge rebuked petitioner and accused him of causing a commotion and instructed him to behave himself. When petitioner specifically asked the judge to instruct the witness not to indicate by the nodding of her head or the shaking of her head an answer to the witness on the stand, the judge ignored this proper request and accused petitioner of being guilty of a serious breach of decorum and reminded petitioner of the "admonition" made at the bench and instructed him to proceed. The admonition obviously referred to was that at R. 81 where the judge threatened to send petitioner to jail at the end of the trial. Because neither the judge nor the prosecutor questioned the factual statements contained in petitioner's objection and in his request for admonitions to the prosecuting witness, the record is made and shows a situation where petitioner would have been derelict in his duty as defense counsel in a criminal case if he did not call the situation to the attention of the court. We see no contempt in this situation but rather the performance by petitioner of his duties as an advocate.

In order to understand the situation at R. 142, the record should be read from R. 138. Petitioner was cross-examining the witness Christianson, a felon, the paramour of the prosecuting witness Ott and the person responsible

for one of her alleged pregnancies. At R. 139 petitioner asked of this felon the following question:

Q. Were you or were you not promised that a charge against you would be dismissed if you would sign a statement and help them to convict Dr. Peckham in this case?

The judge called counsel to the bench and in a threatening manner demanded of petitioner:

What basis have you for asking that question?

This question of the judge was made in such a loud tone that petitioner believed the jury heard it. Accordingly, petitioner objected to the loud tone used by the judge and to threats by the judge intended to intimidate petitioner in his defense of Dr. Peckham. Again, as in prior instances, the judge did not question the accuracy of petitioner's objections, but treated the making of these objections against the tone of the judge's voice and his threats as discourtesy (R. 139). Petitioner politely and courteously informed the judge that he believed it was his duty to object when he felt that the judge's voice and attitude were prejudicing his client's defense (R. 140). The judge then insisted upon an answer to his question and for the basis for petitioner asking the witness whether he had received any promise that a charge against him would be dismissed if he would assist in the prosecution of Dr. Peckham (R. 140). When petitioner stated that a pending indictment against Christianson had been dismissed on January 30th, the judge admitted that petitioner had the right to ask the question. During the course of this discussion, petitioner pointed out to the judge that the case he was trying was a difficult one (R. 141), that he wished to make a motion without interruption and without statements being made in the hearing of the jury, such as the one which the judge had made earlier that the petitioner was

"stupid," and because of such statements petitioner wanted to make a motion for a mistrial. However, before petitioner could fully state the grounds of this motion, the judge interrupted him, denied the motion and again threatened petitioner with serious punishment (R. 142). When petitioner asked what misconduct he was guilty of, the judge refused to answer and ordered him back to the counsel table. We submit that petitioner's conduct during this incident was neither insolent nor contemptuous and did not justify jail or other threats by the judge.

The details of the incidents next referred to by respondent (Br. 6) are set forth in the Appendix to respondent's Brief and will be discussed later.

B. Respondent states (Br. 6-7) that the Court of Appeals affirmed four of the twelve categories of misconduct but found that the record did not support the penalty imposed. In footnote 2 (Br. 6) respondent argues we are incorrect when we state that eight of the contempt findings were reversed. We think a reading of the two opinions below (R. 264; 269) will support our contention that only four of the findings were affirmed and the remaining eight necessarily were reversed. Actually we feel that the Solicitor General agrees with our contention in this regard as his Brief sets out (Br. 9-10) and discusses only the four charges which were affirmed below.

C. Respondent next discusses the details concerning petitioner's alleged contempt. After quoting verbatim specifications 1, 2, 6 and 12 from the judge's certificate (Br. 9-10), respondent states that a sharp conflict exists between respondent and petitioner as to who initially provoked the altercations in the trial court. Respondent states a resolution of this conflict requires consideration of the "entire record" as incorporated by reference in the judge's findings (Br. 11). In addition to the references cited by the judge, respondent desires this Court to search the "entire record" for additional citations which will tend to sustain

the judge's findings of contempt. The appeal in this case has been pending for almost two and one-half years. Respondent had full opportunity to include in the Joint Appendix filed in the case below all relative material which supported the contempt sentence. In such circumstances we do not think it is the duty of this Court to now make a search of the entire record in the *Peckham* case in an effort to find some support for belated arguments now appearing in respondent's Brief. While reading of the record will support our contention that petitioner is not guilty of contempt, we shall confine our Reply Brief to the record as relied upon by the judge and to those portions of the record which respondent relies upon in its Brief. Before discussing the four specifications of the judge which were affirmed below, we again invite the attention of this Court to the fact that none of the specifications allege that the actions taken by the petitioner were taken deliberately, wilfully, in bad faith and obstructed judicial duty. The judge has failed to charge and find that the petitioner did not act in good faith and has failed to find that petitioner did not act in what he considered to be the honest discharge of his duties as an advocate for an accused in a criminal case. Nor has the trial judge found that any of the acts charged to the petitioner obstructed the trial or impeded it in any way. Deliberate intent and obstruction of judicial duty must be charged and proven before an attorney can be held to be in contempt of orders and rulings of a Federal court. *In re Watts and Sachs*, 190 U. S. 1, 32, 35; *Ex parte Hudgings*, 249 U. S. 378, 383; *Clark v. United States*, 289 U. S. 1, 11. In the absence of such charges and findings and the establishment beyond a reasonable doubt of a deliberate intent to take actions in defiance and obstruction of court rulings, there is no contempt. *In re Cottingham, et al*, 66 Colo. 335, 182 P. 2; *Tracy v. State*, 28 O. Cir. Ct. Rep. 453; *State v. Stillwell*, 8 Or. 619, 157 P. 970; *Krueger v. Krueger*, 32 S. D. 470, 143 N. W. 368; *In re Dealton*, 105 N. C. 59, 11 S. E. 244. The basic reason underlying these decisions is that the preservation of the independence of

the Bar is vital to the due administration of justice. Its members should not be imprisoned for errors in judgment when they act in good faith and in the honest belief that their actions are justified and are taken in the interests of their clients.

As the respondent has elected to avoid arguing the constitutional questions involved we submit that our contentions concerning these constitutional questions are conceded. Because respondent discusses only the merits we will consider the affirmed specifications and their merits.

SPECIFICATION ONE.

On Numerous Occasions He Made Insolent, Insulting and Offensive Remarks to the Court and Was Guilty of Gross Discourtesy to the Court.

As the citations relied upon by the judge concern objections and motions concerning the judge's conduct and relate to rulings on evidence, and the propriety of questions, certain fundamental principles should be considered in dealing with this particular finding. Objections of an attorney if wrongfully criticized in the presence of a jury by a judge is prejudicial. *Shepard v. Brewer*, 248 Mo. 133, 154 S. W. 116. When a judge states that an objection made by counsel is ridiculous and threatens counsel with fine and imprisonment, the judge's conduct is wrongful and prejudicial. *Bennett v. Harris*, 124 N. Y. Supp. 797, 68 Misc. 503. It is prejudicial error for a judge to reprimand counsel for interposing proper objections to conduct deemed wrongful by him on the part of opposing counsel or the judge. *Adams v. Fisher*, 83 Nebr. 686, 120 N. W. 194. Every latitude on the admissibility of evidence should be given an attorney for pressing his claims and he should be permitted to propound legitimate arguments, express his points of view and protest erroneous rulings even though the attorney may be honestly mistaken. *Chula v. Superior Court in and for Orange County*, 240 P. 2d 398. We will now demonstrate that the judge's citations do not sustain specification one.

(1) June 4, 1952. (R. 78-79). Full comprehension of this charge requires a reading of R. 74-79. Analysis discloses that petitioner caused a subpoena *duces tecum* to issue to the witness Hodges of Erie, Pennsylvania, mother of the complaining witness. She appeared to testify. Previously petitioner offered to examine her in the prosecution's case as a convenience to her, but this was declined. Later, the judge indicated some concern about keeping the witness in attendance because of reasons personal to the witness. To accommodate Mrs. Hodges, petitioner called her out of turn. After certain preliminary questions, petitioner asked her whether she came to testify under subpoena. Without objection by the prosecutor, the judge interrupted and excluded the question as immaterial. Petitioner objected to the interruption and stated he wanted the opportunity to present what evidence he could from the witness. This was a proper request as the witness was testifying early in the trial out of order, the subpoena called for certain correspondence, she was to leave the jurisdiction and the defendant's case was not in. The judge considered this objection as insolent, whereupon petitioner denied that he meant any insolence. Petitioner, on reconsideration, stated that he preferred to wait and question the witness at the proper time in his case. The judge ordered petitioner to proceed with the examination. Petitioner complied. Petitioner's objection to the judge's interruption also was directed to the prosecutorial attitude of the judge in ruling out questions which were not objected to by the prosecutor. Not only do we find no contempt in this situation, but the court below, while it was divided as to the effect of the judge's conduct on the fundamental fairness of the trial, nevertheless, concluded that the trial judge did assume the functions of an advocate (R. 281) and this is an instance of that conduct.

(2) June 4, 1952 (R. 81-82). While petitioner was examining Mrs. Hodges, the mother of the complaining witness, the prosecutor made an objection which was vigor-

ously sustained by the judge. Thereupon petitioner noted his objection to the vigor of the judge's ruling in the following manner:

If Your Honor please, I object to Your Honor raising your hand and leaning forward and looking at the District Attorney before he makes an objection.

This objection was made because petitioner believed and stated for the record that the judge was thus inviting objections by the prosecutor where perhaps none would be made. The judge did not deny this conduct. Counsel were called to the bench and the judge termed petitioner's objection as insolent and threatened to send him to jail at the conclusion of the trial. In order that the record might be clear, petitioner at the bench and out of the hearing of the jury asked the judge:

Didn't Your Honor do that?

The judge refused to answer the question and told petitioner he had no right to address questions to the court and then characterized petitioner's conduct as unethical and discourteous and again threatened him with jail. He promptly informed the judge that he intended no discourtesy but was following the procedure suggested by our Court of Appeals for describing in the record events involving a judge as they occurred at the trial. As the judicial conduct of the judge was questioned by the petitioner in good faith, he believed what he was doing in conformity with the opinions of the court below in the cases of *Butler v. United States, supra*, *Billeci v. United States, supra* and *Vinci v. United States, supra*. If the personal conduct of a judge is such that counsel believes it should be reviewed because of its prejudicial effect, threats of contempt should not deter counsel from noting his objections. Here the objection was made in a respectful manner and the judge's characterization of the objection as insolent and contemptuous can be ascribed to his personal sensitivity to objections regarding his personal behavior.

in the case. Petitioner's actions in courteously noting his objections were in no sense contemptuous.

(3) June 4, 1952 (R. 113-114). At a bench conference petitioner out of hearing of the jury noted his objection to the interference by the judge in the cross-examination of the prosecution witness Kilpatrick and to the statement by the judge forbidding petitioner to speak or object while the witness was testifying. This objection was respectfully made but was resented by the judge. Where counsel intends to question on review the judicial conduct of the judge, counsel certainly has the right to describe the judge's conduct on the record, and we question whether any trial judge could enter a valid order forbidding counsel to interpose objections to the judge's conduct. Nevertheless, the position of the judge here was, because the objection as made was directed to his personal actions in the trial, that the objection itself is contemptuous. We submit the record shows otherwise and the court below has so held. *Billeci v. United States, supra*. *Butler v. United States, supra*. *Vinci v. United States, supra*.

(4) June 4, 1952 (R. 115). A discussion arose concerning a diagnosis made by Dr. Kilpatrick regarding the factors taken into consideration by him in forming his opinion. Petitioner addressed the judge as follows:

I want him (Kilpatrick) to read what is there and he wants to ask the court whether he should read what is there, but he had previously said that he had read them and had considered them.

The judge thereupon characterized petitioner's demeanor as follows:

Don't be so nervous.

Petitioner apologized and informed the judge he was not nervous, to which the judge responded:

I think you will have to change your tone.

Petitioner replied:

I don't mean it.

Obviously, sensing that petitioner was upset, the judge suddenly informed him to change his tone. At this time there was no suggestion from the judge that anything petitioner did or said was regarded by the judge as contemptuous. By now efforts of petitioner to note for the record the failure of the judge to act impartially caused almost any exchange between the judge and petitioner, which involved any criticism by petitioner of the judge's conduct, to be used by the judge as the subject matter of a contempt citation. It is not surprising in such circumstances that petitioner became alarmed. The hostility of the judge toward petitioner became more obvious with each objection he noted. The court below found that the judge displayed "hostility" and "bias" against petitioner (R. 280, 281) and this is an instance of that hostility. Surely objections made by an attorney to judicial behavior, courteously stated as here, are not offensive to the dignity of the court and do not constitute contempt. *Whitaker v. McLean*, 73 App. D. C. 259, 118 F. 2d 596; *Billeci v. United States*, *supra*.

(5) June 5, 1952 (R. 133-134). We submit that this instance is but another example demonstrating the propensity of the judge to magnify out of context petitioner's conduct. A question propounded to the witness Kilpatrick which might have been asked on the preceding day became the subject matter of an exchange between the judge and petitioner. The record reveals only that an exclusionary ruling to a particular question was made by the judge which petitioner obeyed (R. 134). Certainly that is not contempt. *Caldwell v. United States*, 28 F. 2d 684.

(6) June 5, 1952 (R. 146). Following the luncheon recess, counsel approached the bench. Out of the hearing of the jury petitioner made a motion for a mistrial on the ground that the judge left the bench in the middle of a

motion being made by him for a mistrial just before the recess. The judge in disposing of this motion denied it in the following derisive manner:

I am denying the motion. I think I will go through the transcript and make up a score card for the number of motions you made for a mistrial during the course of this trial.

As petitioner believed that the judge was speaking in tones loud enough for the jury to hear, he objected as follows:

I object to that. I think your voice carries more than Your Honor realizes.

Petitioner was fully justified in making this objection for the reason that the judge's remark was derisive and belittled petitioner and the jury should not have heard this prejudicial ruling of the judge. The judge was under the duty of making this ruling calmly and not in the hearing of the jury. *Billeci v. United States, supra* (p. 402). Accordingly, we see no contempt in petitioner noting the objection which he did at the bench and if he had not noted his objection in view of the derisive character of the judge's ruling, petitioner would have been derelict in his duty to his client.

(7) June 5, 1952 (R. 154-155). Petitioner rose to note an objection but before he could state it the judge signaled him with his hand to sit down. To this conduct petitioner noted his objection. To this objection the judge commented:

Will you keep your seat or I will have the Marshal make you resume your seat.

Here again is an instance where an objection interposed to the treatment of petitioner by the judge was treated in a derisive and threatening manner. Later the judge construes this objection as contempt. Yet petitioner was only doing his duty in making what he thought was a proper objection. *Billeci v. United States, supra*, (p. 402).

(8) June 6, 1952 (Br. 157-158). At this point in the trial in the course of the examination of the witness Sullivan several interruptions were made by the prosecutor and the judge. Petitioner stated that he found it difficult to examine the witness in the face of such interruptions. The judge denominated this objection as discourteous. Petitioner assured the judge that he meant no discourtesy nor did he mean to be repetitious in his questioning and before he could complete his statement the judge cut him off and exclaimed:

You must not address the court in that manner. I am going to exclude that question as repetitious.

The judge having ruled, petitioner followed that ruling and proceeded to the next question. This exchange between the judge and petitioner fails to justify a contempt charge. *Caldwell v. United States*, 28 F. 2d 684.

(9) June 6, 1952 (B. 160-162). The foundation for this charge arose when petitioner made an objection to the presence and position in the court of the prosecuting witness, Mary Ott. She was occupying a prominent place in the front row in plain view of the jury. The judge ruled that she could remain as a spectator. Whereupon the prosecutor volunteered the following remark:

She has not been released from a subpoena for the Government.

Thereupon the judge stated it was permissible for her to sit anywhere she chose. Petitioner objected and the judge asked to what he addressed his objection, to which petitioner replied that he was objecting to the "long dissertation" about it.

I made no argument. Your Honor has not permitted me to make any argument and I merely object to Mr. McLaughlin—

At this point the judge interrupted petitioner, stating:

I think you are getting very discourteous to the court.

According to the record, petitioner was not permitted to complete his objection, as was his right, (*Billeci v. United States, supra*) and was endeavoring to point out that he was objecting to the unsolicited remark of the prosecutor, made apparently for the benefit of the jury to justify the disconcerting position in the court of the prosecuting witness. It was also petitioner's belief that the witness had occupied that position in order to signal other witnesses for the prosecution. We submit that the objection of petitioner was valid and when he tried to explain the nature of his objection the judge cut off that explanation. Nevertheless, even in this situation petitioner made no further statement and the trial proceeded. We submit that no contempt can be spelled here. No more was done by petitioner than another attorney was upheld for doing before the same trial judge in *Butler v. United States, supra*.

(10) June 9, 1952 (R. 177-179). Restoration of the text involved in this instance will show that the judge regarded the objection noted to his judicial conduct as personally offensive. The event mentioned in the judge's certificate is traceable to the gestures and mannerisms of the judge, including the raising of his voice within the hearing of the jury. After this objection was entered, the judge without denying that the conduct charged to him had occurred, exclaimed to petitioner:

Go back to the counsel table or I will have the Marshal put you there.

Petitioner attempted to make a proffer and offered to submit to the judge a case which he believed should govern the ruling in connection with the question involved. The judge belittling the principle of law urged by petitioner,

informed him that the judge knew "Hornbook law" and directed him to return to the counsel table. When petitioner registered objections to the judge's gestures and mannerisms at the bench, the judge said:

You have been very discourteous to the court throughout this trial and you have forfeited the right to that courteous treatment which this court extends to all members of the Bar.

Petitioner immediately informed the judge that he was not discourteous but that it was his duty to object to the actions of the judge in raising his voice from time to time. The judge did not deny this conduct but replied to counsel as follows:

Yes, and I shall deal with the matter at the end of the trial.

This exchange demonstrates how impatient the judge became when objections to his gestures and mannerisms were made, even out of the hearing of the jury, and the judge made it plain he did not intend to be courteous to petitioner thereafter. Accordingly as petitioner made such objections, the judge became caustic and addressed petitioner in a discourteous manner and threatened him. We submit that the petitioner was guilty of no discourteous conduct under these circumstances. He was merely performing his duty to his client. *Butler v. United States, supra; Billeci v. United States, supra.*

(11) June 9, 1952 (R. 195-196). The gist of the judge's charge of contempt in this instance appears to be predicated upon the following objection noted by petitioner:

Now, if Your Honor please, I object to your raising your voice at me and shaking your hand in that manner and appearing to reprimand me.

The judge did not deny that he had raised his voice, that he had shaken his hand or that he had reprimanded the

petitioner, but simply regarded the suggestion itself as contempt. As Mr. Justice Jackson said in the *Sacher* case, men who have become judges sometimes exhibit vanity, irascibility, narrowness, arrogance and other weaknesses to which human flesh is heir. Most judges, however, do not resent an objection, even when it is directed to the judge personally. In cases wherein judges have not been properly detached from the cause, counsel have successfully secured reversals. *Whitaker v. McLean, supra; Butler v. United States, supra.* A trial attorney in his efforts to protect the rights of his client should be free to enter upon the record such conduct of any trial judge which the attorney believes destroys the court's impartiality or prejudices his client's case, as was held by the court below in the *Billeci* case. We think the significant thing is in the instant case where objections were made to the judge's conduct, that the conduct was not denied but the making of objections thereto are treated as personal contempts. We submit there was no contempt and that the judge here was under the duty of considering that such objections were not discourteous and were not insolent. *Schmidt v. United States*, 115 F. 2d 394, 398.

(12) June 10, 1952 (R. 209-210). Apparently at the middle of page 209 the judge unnecessarily raised his voice and shouted to petitioner "Hand it to the Clerk." Petitioner objected to the judge raising his voice and shouting. The judge did not deny that he had raised his voice and shouted, but regarded petitioner's objection as insolent, contumacious and an attempt to provoke a mistrial. On that state of the record petitioner moved for a mistrial because of the judge's aspersions that petitioner was trying to create an episode to cause a mistrial. Petitioner (R. 210) explained that he had only been trying to make a proffer of evidence. Again, petitioner requested the judge to correct any adverse impression on the jury because of the attitude of the judge as shown by his gestures and the intonation of his voice. No such admonition was given the

jury. This failure of the judge to so admonish the jury was criticized by the Court of Appeals. That court ruled that minimal precautions required such an admonition (R. 281-282; and see erroneous footnote 15 of respondent's Brief, p. 35). The judge did not deny the conduct charged but regarded the objections made as contempt because directed to his personal manner of officiating at the trial. If this conduct of petitioner be contempt, similar objections of counsel following the ruling in *Billeci v. United States*, *supra*, p. 462, to the trial judge's methods or mannerisms, no matter how well founded in fact, would likewise constitute contempt. This cannot be the law.

(13) June 10, 1952 (R. 215-216). The incident regarded by the judge as discourteous involves the examination of the witness Jones, a "boyfriend" of the complaining witness. Petitioner objected to the judge yelling at him. The judge did not deny raising his voice but said if petitioner said "another word" he would have the Marshal "gag" him. Further, the judge wrongfully charged petitioner with interrupting the witness before he completed his answer. Petitioner denied interrupting the witness. When the question was put to the witness as to whether or not he had completed his answer, he answered in the affirmative. The charge of the judge, therefore, was unfounded. The judge then charged the petitioner with exhibiting "a menacing manner" toward the witness but the record fails to show in what respect counsel menaced the witness. When petitioner noted his objection to the characterization by the judge of petitioner's alleged menacing manner, the judge simply replied:

It seems so to the court.

Since the record is silent as to what activities of the petitioner the judge considered menacing, it is difficult to understand how counsel, directing his questions to a witness from the counsel table, could "menace" a witness. In fact, when petitioner sought information concerning the judge's

al actions, he was met with the comment of the
(217):

now the Court doesn't invite any replies to its
agents."

cited conduct of petitioner can be considered con-
not seen.

une 10, 1952 (R. 221-222). We submit the record
at the trial judge assumed in many instances the
he prosecutor, and the court below has sustained
r's objections in this regard (R. 281). In fact,
judge conducted major examinations in some in-
ad made numerous *sua sponte* objections to ques-
pounded by petitioner. This conduct of the trial
is condemned by all judges of the Court of Ap-
being not required by the trial judge's obligation
in a firm and salutary control over the proceed-
(281-282). On this day petitioner noted an objec-
ne judge "looking over at counsel when I ask a
and then Mr. McLaughlin stands up." Petitioner
s objection because he believed that the judge
aling objections to the prosecutor. The facts on
s objection was made were not denied by the judge
egarded the *making* of the objection as insolent.
ction was made in a normal tone and is but one
as of courteous objections to the conduct of the
high conduct petitioner believed to be objection-
prejudicial as deviation from the desirable judi-
ard. And the court below has sustained petitioner
g that "the excessive injection of the trial judge
examination of witnesses, his numerous comments
se counsel * * * demonstrated a bias and lack of
ity," and the judge should have "restrained his
tion of the examining process" (R. 281-282).
e, petitioner was justified in objecting to such
is he had the right to anticipate that if the record
nduct was clear, a conviction obtained under such
ances would be reversed, and that is precisely

what occurred on appeal. The case was reversed chiefly because of this conduct of the judge which petitioner objected to. These valid objections cannot now be said to have been contemptuous and we submit it was petitioner's duty to make them as he did. *Rilett v. United States*, *supra*.

(15) June 10, 1952 (R. 228-230). During the examination of the witness Steerman, the following colloquy is made the basis for contempt:

THE COURT: What is the exhibit?

MR. McLAUGHLIN: It is the statement of Miss Ott and it was really for the purpose of trying to impeach the witness.

THE COURT: You may not use that in connection with this witness.

MR. OFFUTT: May I ask my question without interruption by the Court?

THE COURT: You may not show that to the witness.

MR. OFFUTT: May I ask my question before an objection is made and not be interrupted?

THE COURT: I shall not permit you to show that to this witness.

At the time of this colloquy, the judge did not regard the question addressed to him by petitioner as contemptuous. Hence, it is difficult for us to understand how a retroactive charge that the question constituted contempt could be valid. Merely making inquiry of a judge during the examination of a witness as to whether a question can be put without interruption in order to obtain a ruling thereon as to its admissibility, is not contempt. Proper trial procedure required that the question first be propounded before an objection to the question could be made and a ruling be made thereon by the judge. *Caldwell v. United States*, *supra*.

(16) June 10, 1952 (R. 230-231). This represents but another of a series of objections lodged by the petitioner against the atmosphere of the trial and against the con-

duct of the prosecutor. On this day petitioner was examining the prosecutor in an effort to connect him with knowledge of a telephone call made by the complaining witness to petitioner during the trial, in an effort to show that the prosecutor was in fact responsible for that call. Petitioner asked the prosecutor if there did not come a time on June 1st after the case started when the prosecutor learned that Mrs. Ott had called petitioner at his home from the Sex Squad Room. The prosecutor answered: "No-no; no; no." (R. 230). Notwithstanding that he had answered the question with four denials, he volunteered the following facetious statement:

That morning I got up about eleven o'clock and went down to St. Patrick's Church, and then I went out to the ball game.

Petitioner promptly moved that this remark be stricken, whereupon the prosecutor continued to volunteer further facetious evidence and stated:

That is my entire day.

Petitioner also moved to strike the second remark, whereupon the judge, apparently highly amused, smiled. Petitioner objected to the judge smiling, contending that he was entitled to have his question answered and the judge should not permit the prosecutor to be facetious with petitioner. Notwithstanding that the judge agreed with petitioner that he was entitled to a serious answer, the judge did not deny that he had smiled, refused to strike the facetious explanations of the prosecutor and charged petitioner with being insolent in objecting to the manner in which the judge handled the situation. Petitioner's position, we submit, was proper. He moved the court to strike the volunteered and facetious remarks of the prosecutor and he was entitled to have the judge rule on that motion in a serious and dignified manner. Petitioner properly objected to the court smiling because petitioner was of the

opinion that this conduct reflected an attitude on the part of the judge which would impart to the jury a spirit of levity in a matter considered important by petitioner in the defense of the accused. We submit when a judge thus departs from ordinary standards of dignity in the trial of a serious criminal case and counsel notes an objection to that conduct for purposes of review, that objection does not constitute contempt but follows the ruling of the court below in *Billeci v. United States*, *supra*, p. 402.

SPECIFICATION TWO.

On Numerous Occasions. He Persisted in Repeating Questions Previously Excluded by the Court in Order to Evade the Court's Rulings in Spite of Admonition by the Court to the Contrary. Many of these Questions Were Obviously Intended to Besmirch a Witness.

It is the general rule that an attorney may ask questions calling for a ruling on the admissibility of evidence and the asking of such questions is neither misconduct nor contempt of court. The reason being that trial procedure ordinarily requires that a question be asked before a ruling can be made as to whether or not that question is proper or whether the evidence elicited by the question is admissible. *Harris v. H. W. Gossard Co.*, 185 N. Y. Supp. 861, 194 App. Div. 688. Surely the asking of a question which is objected to and which is excluded should not furnish foundation for a contempt charge when counsel has the right to submit the question for a ruling. We ask how else could counsel proceed in asking questions. If the mere asking of an irrelevant, immaterial or objectionable question can be used as a basis for a contempt citation against an attorney in a criminal case, virtually all members of the Bar would soon be decimated. The following decisions should be considered under specification two: *Caldwell v. United States*, 28 F. 2d 684; *Sprinkle v. Davis*, 111 F. 2d 925. A further principle should be borne in mind and that is that actions taken by counsel, even though he may be mistaken as to the law, should not be considered

as contemptuous unless the evidence shows beyond a reasonable doubt that counsel is guilty of a willful, deliberate and intentional violation of a court order or ruling. *In re Watts and Sachs*, 190 U. S. 1, 32, 35.

We will now examine specification two and its citations.

(17) June 3, 1952 (R. 54-55). While petitioner was cross-examining the prosecutrix the judge excluded any reference to what George Christianson, her paramour, had said. Petitioner then reframed his question as follows:

You said that George objected to it. When did he object to it? Give us the date.

The prosecutor objected. The judge objected. Whereupon, petitioner informed the judge that he did not want the conversation and that he had misunderstood the judge's ruling. At the time of this incident the judge did not regard the question as contempt and stated:

You (petitioner) can't be as stupid as all that. Do not transgress my ruling again.

While we submit that it was improper for the judge, in the presence of the jury, to call petitioner "stupid" and petitioner could well have shown resentment to this statement, nevertheless, petitioner restrained himself and when the judge ordered him to proceed with his questioning, he did so. The incident was thus closed and it was not referred to by the judge again until the certificate of contempt was filed. We submit that petitioner's conduct was not contempt. *Caldwell v. United States, supra*; *Sprinkle v. Davis, supra*.

(18) June 13, 1952 (R. 56-58). The record shows, while no question was pending, that the prosecuting witness Ott made a voluntary statement (R. 56). Petitioner called this improper statement to the judge's attention by saying:

Just a moment. Listen to that, Your Honor, I ask you to admonish the witness.

Whereupon the judge responded:

Just a moment, you have no right to address the court that way. You have no right to say to the court "Listen to that, Your Honor."

We submit that counsel had a right to call the attention of the court to the fact that the prosecuting witness was volunteering evidence and this did not constitute contempt. On this day counsel also directed the following question to the complaining witness:

Mr. Christianson was still working at the Riggs Bank then, wasn't he?

In sustaining an objection, the judge said:

I told you that you may not inquire concerning Mr. Christianson's activities on cross-examination of this witness. If Mr. Christianson should be a witness, you may cross-examine him as to his activities, but you may not cross-examine this witness.

When counsel requested permission to approach the bench to explain his position, the judge denied this request, and it appears that petitioner promptly obeyed the judge's ruling. We fail to see in what respect counsel "persisted in repeating questions previously excluded." This citation does not support that charge. *Caldwell v. United States, supra; Sprinkle v. Davis, supra.*

(19) June 3, 1952 (R. 58:59). This specification rests upon the following language:

QUESTION: (By Mr. Offutt) Did anyone else discuss the fact, any of the facts with Lt. Ernst to your knowledge?

MR. McLAUGHLIN: I object to this Your Honor.

THE COURT: Objection sustained.

MR. OFFUTT-QUESTION: Didn't Lt. Ernst call somebody in your presence and ask about this case when you went to see him?

MR. McLAUGHLIN: I object to this.

THE COURT: Objection sustained. Now, I told you that I will not permit another question asked about that conference because you exhausted the entire field yesterday and I suggest to you that you must not transgress my ruling.

We submit on the cited facts that there was no contempt. Promptly when the judge ruled, petitioner acquiesced respectfully in that ruling and proceeded.

(20) June 3, 1952 (R. 59-60). As part of the defense it was petitioner's theory that a strong hypothesis existed that one of the two abortions charged was committed by the prosecuting witness herself. In his cross-examination of this witness, petitioner endeavored to develop that she was responsible for the abortion. The mere denial by the witness Ott that she committed the abortion does not justify a finding by the judge that "he saw or heard a contempt." When the judge called petitioner to the bench, he sought the basis for petitioner's question. Petitioner informed the judge that he derived his information from Dr. Kilpatrick and from the hospital records. If the charge that petitioner "besmirched" this witness by inquiring whether she herself committed the abortion is sustained, we respectfully submit that a defendant in a criminal abortion case would be seriously restricted in developing his defense. It must be remembered that the defendant vehemently denied that he had any connection with the abortion. It was consistent with his defense to demonstrate that the prosecuting witness herself was not only capable of committing an abortion, but had actually had experience with abortions. Further, the evidence was admissible on credibility and the court below so held (R. 274) and in *Thompson v. United States*, 30 App. D. C. 352. Hence, petitioner was justified in doing what he did and no contempt occurred.

(21) June 3, 1952 (R. 62). This citation shows only that petitioner made an inquiry of a witness, whereupon the judge interrupted stating:

Just a moment, you have asked that question twice and I will not permit it a third time.

It does not appear that petitioner transgressed that ruling. The only other incident on this page of the record is that the judge advised counsel how to accent the name Kilpatrick. Obviously, no contempt occurred on this occasion. *Caldwell v. United States, supra; Sprinkle v. Davis, supra.*

(22) June 4, 1952 (R. 84-85). A fair appraisal of the cited portions of the record which concern the examination of the witness Hodges, mother of the complaining witness, fails to show that anything took place except exclusionary rulings of the judge to a question as irrelevant. The ruling was that any conversation between the witness and the petitioner was not admissible. At the time of this ruling there was not the slightest suggestion on the part of the judge that he considered this question contemptuous. The mere repetition of a question by counsel where *two* separate charges of abortion are involved and which involve *two* separate states of fact under the involved circumstances of this case is not contempt. The question by petitioner to the witness was:

When was the first time you saw me or talked to me after you came to Washington.

How the asking of such a question could be considered to be contempt is not seen. *Caldwell v. United States, supra.*

(23) June 4, 1952 (R. 122-123). During the examination of Dr. Kilpatrick, the judge made a ruling limiting the admissibility of certain hospital records. Obviously, this ruling was erroneous because the doctor admitted (R. 108) that he had read the entire record of the patient and that he had used that entire record, including the history furnished by the patient, as the basis for his opinion. Petitioner accordingly asked Dr. Kilpatrick the following questions:

And did you not in connection with a study of the chart of the patient read that the patient had been treated in a psychiatric ward in 1950, Sir?

The judge *sua sponte* said:

Just a moment. I am excluding that. That is not proper cross-examination.

Aside from this interjection and erroneous ruling by the judge, limiting petitioner in his attempts to develop by cross-examination of Dr. Kilpatrick the medical background of the prosecuting witness and proceeding on the assumption that the ruling regardless of error must be obeyed, we submit that a reading of these pages of the record does not disclose contempt. A question directed to a medical witness with respect to the psychiatric treatment of a prosecuting witness in a case in which there were two abortions concerning that witness and under the issues raised by the defense concerns, in our opinion, material and relevant evidence. Nevertheless, we submit it is significant that when the judge announced his ruling, counsel complied with that ruling. We submit it cannot seriously be contended that the questions here asked were asked at the peril of counsel. Before any question can be determined to be proper or improper, it must first be asked. *Caldwell v. United States, supra*, p. 684.

(24) June 5, 1952 (R. 129-130). We submit that this citation shows an unreasonable attitude of the judge against petitioner. During the examination of the witness Kilpatrick, petitioner asked him whether he had talked to the prosecutor. The judge interjected (R. 130):

You have already asked him that and he has answered the question. Now you have to have some terminal facilities.

Petitioner explained to the judge that it was difficult for him to keep his powers of thought as he did not remember

whether he had asked that question, that he did not mean to be repetitious and apologized to the judge, explaining that he was sorry if his memory was not as good as that of the judge. Petitioner also pointed out to the judge that when the judge moved quickly while he was interrogating a witness and jumped from his seat to the desk as if he were about to reprimand petitioner, that upset petitioner and made him nervous. We submit the occasional honest repetition of a question should not form a basis for contempt nor should an attorney be held in contempt when he respectfully suggests to a trial judge that certain of the judge's personal mannerisms upset the attorney and make him nervous.

(25) June 5, 1952 (R. 131-132). This exchange between the judge and petitioner fails to show that petitioner did anything that could be construed as contempt. The judge *sua sponte* made two exclusionary rulings against questions asked by petitioner. The judge answered an inquiry by petitioner as to what his exclusionary ruling concerned, as petitioner explained that he did not want to transgress the judge's ruling. We invite the reading of this portion of the transcript as it demonstrates the facility of the judge in retroactively finding contempt where none in fact existed.

(26) June 5, 1952 (R. 135-136). Petitioner propounded a question to the witness Kilpatrick which he later attempted to withdraw over the objection of the prosecutor. The judge felt that even though petitioner withdrew his question that the witness should answer "in fairness to the jury." We submit it is not contempt upon reconsideration by examining counsel to withdraw a question. As we understand trial practice, counsel has a right to withdraw a question before it is answered. It was the privilege of the prosecutor to ask the question upon his redirect examination if he deemed an answer desirable. No contempt occurred here.

(27) June 5, 1952 (R. 144). Petitioner was cross-examining George Christianson, paramour of the prosecutrix, and asked this question:

She was not your wife. Isn't that right?

Christianson answered:

That is right.

The judge interposed:

We have been over that. She admitted she was not his wife.

The fact that Mary Ott had so testified did not bar petitioner from asking the question of her paramour. But let us assume that the question was somewhat repetitious, the fact that the judge felt that this question might be repetitious because *another* witness had testified to the same fact forms no basis for a contempt citation. If that be so corroborating evidence would not exist. An examination of the record reveals that the judge was inclined to treat any question that had a tendency to be repetitious as a contempt. We say this type of question is inflated out of all proportion for the purpose of making a contempt citation against counsel.

(28) June 5, 1952 (R. 151). During the cross-examination of the witness Christianson, petitioner propounded several questions which were not objected to concerning the prosecutrix. Petitioner then asked the following question:

Didn't you know that once before, from what she had—didn't she tell you that once before she was to have a baby and she tried her best to stop having a baby?

ANSWER: No.

MR. McLAUGHLIN: I object, your Honor, there is no such testimony.

THE COURT: Objection sustained.

As the witness Ott herself admitted and the indictment charged two separate abortions of her, this question was proper. The judge did not reprimand petitioner for asking the question and merely ruled that the witness could not be asked that question: "*while on cross-examination*" which is an indication to us that the judge would have had no objection to the question if petitioner had taken the risk of calling the witness Christianson as his own witness and putting the question to him on direct examination. How this can be treated as a contempt is not seen.

(29) June 9, 1952 (R. 171-172). Petitioner, while examining the witness Graff, informed the judge that there was a conflict in his testimony with that of the witness Christianson. The judge responded that it was not admissible and informed petitioner that he could not contradict a witness on a collateral matter. Although the judge felt there were deviations in details which was natural between two human beings, the judge said he did not see any "real conflict." Except for this discussion, there is nothing in the record reference to indicate that petitioner did anything that would even resemble contempt.

(30) June 9, 1952 (R. 172-173). The following colloquy is the basis for this contempt citation:

THE COURT: Now don't you understand my ruling that I have excluded that?

MR. OFFUTT: All right.

THE COURT: Don't you dare repeat questions in a different form after I have excluded them.

MR. OFFUTT: If your Honor please, I am sorry to have to object to this, but I object to your raising your voice and shaking your hand at me in the presence of the jury.

THE COURT: Yes, I am going to shake my finger at you some more if you do not behave yourself.

MR. OFFUTT: Now I submit I have a right to make this objection, Your Honor, and I am not doing anything to—

THE COURT: You must behave yourself.

When the question was excluded by the judge, petitioner did not make any further effort to ask the question over again, which is the nature of specification two, but simply objected to the manner in which the judge chastized petitioner with gestures and intonations. The question dealt only with an exclusionary ruling of the judge directed to the witness Graff who was a mere custodian of the records at the District Jail. The discussion between the judge and the petitioner did not result from the question but came as a result of the objection noted by petitioner in a courteous manner to the personal attitude and mannerisms of the judge. This is another example of the judge abusing petitioner in the presence of the jury in a threatening manner (critized below R. 280, 281) because an objection was made by petitioner to the personal demeanor of the judge, made in accordance with the ruling of the court below in *Billeci v. United States*, *supra*, p. 402. We see no contempt here.

(31) June 9, 1952 (R. 174-176). Blanche Dobkin was called to the stand as a witness for the defendant. She testified that she was the operator of a rooming house and that a Mr. and Mrs. William Ott resided there. The judge stated that he believed such testimony to be immaterial. The prosecutor thereupon conceded that the complaining witness, Mary Ott, was so living at the rooming house. The purpose of the question was to show that Mary Ott was living with a William E. Jones and was holding him out as her husband even though she was not married to him. The judge excluded the answer and informed counsel that it was not necessary for him to corroborate this illicit relationship and then in presence of the jury made the uncalled for remark that this relationship was a "side issue that has nothing to do with this case." Certainly petitioner's efforts to show the meretricious relationship of the witness Ott were not contempt. Meretricious relations of witnesses may be shown in a criminal case as they affect morals, hence credibility, and show witnesses in their true light.

Questions to this end are proper and do not "besmirch" the witness. *Thompson v. United States*, 30 App. D. C. 352; *Alford v. United States*, 282 U. S. 687, 692; *Tla Koo-yel-lee v. United States*, 167 U. S. 274. Even the trial judge here involved has so ruled in the prosecutor's favor. *United States v. Edmonds*, 63 F. Supp. 968, 973. It was the position of the judge that it was immaterial whether the prosecuting witness lived with another man in a meretricious relationship. It was, as the judge stated, a side issue that had no bearing on the issue on trial because he felt that the guilt or innocence of the defendant was the only issue involved and that meretricious relationships of the principal witness for the prosecution were not material. We submit that the credibility of the complaining witness is a vital issue in an abortion case where that witness claims she was the victim of two separate abortions by the defendant. First, considering the concession of the relationship by the prosecutor and the belief by the petitioner in the materiality of the proffered testimony, it is difficult to conceive under what theory the judge below considers the placing of a witness on the stand to prove an illicit relationship is contemptuous. The witness Dobkin had to be produced in order to obtain a ruling on the admissibility of her testimony. How else can a trial attorney secure a ruling. After the concession by the prosecutor that the meretricious relationship existed, petitioner withdrew the witness in conformity with the judge's ruling. Nevertheless, on the merits the testimony was admissible on credibility as moral involvement by a woman affects her credibility. *Thompson v. United States, supra*.

(32) June 9, 1952 (R. 178-180). Counsel approached the bench and each conferred with the judge in a low tone. Petitioner made a proffer of certain parole board records and stated he expected to show that the witness Christianson was on parole in the District of Columbia, that when Christianson made an application for parole the parole board addressed a letter to the complaining witness, Mary Ott, in which she was asked the status of her husband. As

a result it was determined that Christianson was already married (R. 36-39). The judge stated he was going to exclude such testimony as "obviously irrelevant." Petitioner attempted to complete his proffer, which was interrupted several times by the judge, and finally the judge in anger stated that the proffer was an attempt on the part of petitioner to besmirch and subject to adverse publicity persons who testified as witnesses in the case and branded the proffer as "unethical." Petitioner informed the judge that the basis for the introduction of the proffered testimony was to show fraud and to attack the credibility of the witness Ott. Despite the fact that the proffer and the discussion in connection therewith all took place out of the hearing of the jury at a bench conference for the purpose of having the judge rule upon the admissibility of the proffered evidence, we find the judge below now labeling the proffer as a contempt. Certainly a proffer thus made is not contempt. We submit the evidence proffered (R. 36, 37, 39) was admissible on fraud and credibility. *Thompson v. United States, supra*; *Alford v. United States, supra*; *Tla Koo-yel-lee v. United States, supra*; *United States v. Edmonds, supra*.

(33) June 9, 1952 (R. 181-183). While testifying on direct examination, the witness Jones was asked by the petitioner whether the prosecuting witness Ott held herself out to be his wife. The judge ruled this testimony by the witness Jones irrelevant and immaterial, stating that the same ruling that had been made concerning the witness Dobkin would be applied. Petitioner objected to the ruling but proceeded with his next question. Obviously, the purpose of this testimony was to place the witness Ott in her true light with respect to her moral character and credibility. Until an exclusionary ruling is made, trial counsel is first obliged to propound a question. A reading of the text fails to show any contemptuous conduct of the nature charged in the specification. We submit that the proffered evidence of the witness Jones was admissible. *Thompson v. United States, supra*; *Alford v. United States, supra*; *Tla*

Koo-yel-lee v. United States, supra; United States v. Edmonds, supra.

(34) June 9, 1952 (R. 190-191). The indictment charged that Dr. Peckham committed one of the abortions on the prosecuting witness Ott on May 2, 1951 (R. 2). May 7, 1951 was a critical date in connection with this charge. Mary Ott testified she was treated by Dr. Peckham on that date. To show that Dr. Peckham could not have seen and treated Mary Ott on May 7, 1951, as she had previously testified, petitioner called to the witness stand Dr. Bernard Tully of George Washington University Hospital (R. 187-190). Dr. Tully testified that Dr. Peckham had been admitted to George Washington University Hospital as a patient on May 6, 1951 and on May 7, 1951 had been operated on for the removal of a disc. Petitioner attempted to develop the details and serious nature of the operation performed upon Dr. Peckham. Dr. Tully described it as a major operation, following which the patient was not permitted out of bed for approximately five to six days. In corroboration of the testimony that the operation was a major one, petitioner attempted to have it described to the jury and asked questions concerning the size of the incision. The trial judge excluded questioning to this end as irrelevant. A reading of the text shows that petitioner complied with the judge's ruling. In view of the positive testimony of the prosecutrix concerning the date May 7, 1951, petitioner considered it essential to have fully described to the jury that on that day the defendant was hospitalized following a major operation and by reason of the nature of his illness and the seriousness of the operation he could not possibly have seen and treated Mary Ott as she testified. Even though the question obviously was admissible for the purpose stated, the record shows petitioner promptly obeyed the exclusionary ruling of the judge. Now the trial judge attempts to use this situation as a basis for citing petitioner in contempt. That is unwarranted.

June 7, 1952 (R. 191-192). Ernst, a policeman, was examined concerning a subpoena issued to the witness and also whether he had made a written admission concerning an alleged telephone conversation. A line of questioning was objected to by the prosecution and sustained by the judge as irrelevant and immaterial. As objections were sustained, counsel did not pursue the same line of inquiry. A fair reading of the text shows no contempt but only that as questions were asked and objections were sustained by the judge, petitioner promptly pursued another line of inquiry. Certainly no contempt occurred here. *Caldwell v. United States*.

June 9, 1952 (R. 193). Petitioner inadvertently re-asked a question to the witness Ernst. When the judge brought to petitioner's attention, he stated that he had been reminded of it by associate counsel and apologized. He was under the impression that he had overlooked the question. Certainly no contempt is shown in this occasion. *Caldwell v. United States, supra*.

June 10, 1952 (R. 219-220). The following colloquy took place between the judge and counsel during the examination of the witness Jones:

THE COURT: May I ask him to read the statement in the second paragraph and see if that will refresh his recollection?

THE COUNSEL: You have already shown him the statement.

THE COURT: I want to ask him—

THE COUNSEL: Just a moment, you cannot ask the witness to refresh his recollection about a matter that the court has excluded. I have excluded this question.

The record shows only that an exclusionary ruling was made which was promptly acquiesced in by petitioner. We see in what respect a contempt occurred.

(38) June 10, 1952 (R. 220-221). Again, during the examination of the witness Jones, the judge made an exclusionary ruling concerning the right of petitioner to examine the witness regarding the credibility of the prosecuting witness. The judge said:

I have excluded this. I invite no response to my ruling. If you wish, you may note an objection, but that is as far as you may go.

Whereupon petitioner accepted the invitation of the judge and said:

I object to it.

The judge replied:

Very well; your objection is noted.

A citation for contempt on this colloquy is unfounded because it shows only a discussion normally occurring between a judge and a trial attorney concerning the admissibility of evidence, the judge's ruling thereon and the invitation by the judge for counsel to object. That was done in a respectful manner. This episode cannot be regarded as contemptuous.

(39) June 10, 1952 (R. 221-222). Again during the examination of the witness Jones an exclusionary ruling was made by the judge who said (R. 222) to petitioner:

You may note an objection and that protects your record.

Petitioner accordingly noted his objection. We fail to see in what respect the judge could consider petitioner's objection as contempt.

(40) June 10, 1952 (R. 222-223). The citation that a question was repeated is not sustained by the record. The questions asked were different and each question was re-framed since the judge's rulings on questions were not

clear and because he frequently forbade petitioner from asking questions concerning his rulings. It was only natural and proper for petitioner, after an exclusionary ruling was made, to reframe his question out of caution in order to properly protect his client's interests. *Caldwell v. United States, supra.*

(41) June 10, 1952 (R. 225-226). During the examination of the witness Jones, the following colloquy occurred:

MR. OFFUTT: Shall I ask the question before I come to the bench?

THE COURT: Don't address any interrogations to the court.

MR. OFFUTT: I am sorry; I am just asking for your Honor's ruling.

THE COURT: Now don't ask it again.

MR. OFFUTT: All right.

When the judge refused to permit petitioner to come to the bench to pose the question he desired to ask, petitioner had no other recourse in order to protect his client's rights than to ask the question. This was done. An objection to it was sustained and the judge accused petitioner of evading the court's ruling. We submit, as petitioner specifically asked the judge for his ruling concerning this witness and stated he did not want to be accused of evading the ruling and the judge refused to explain his ruling, it is difficult for us to understand how, when the question was then asked for a ruling on it in open court, that can be treated as contempt.

(42) June 10, 1952 (R. 226-227). During the examination of the witness Steerman, the judge vigorously sustained an objection of the prosecutor and raised his hand at petitioner. Whereupon the following colloquy occurred:

THE COURT: Just a minute.

MR. McLAUGHLIN: I object to this, your Honor; it is immaterial.

MR. OFFUTT: If your Honor please, I object to your Honor raising your hand like that—I don't—

THE COURT: Now that is an insolent remark.

MR. OFFUTT: I want the record to show you raised your hand.

THE COURT: I think you are losing your mind, Mr. Offutt.

MR. OFFUTT: I am doing what the Lewis case decision says I should do. I want the record to show these things.

We submit the judge here became provoked when petitioner noted for the record the personal mannerisms and actions of the judge. It is the colloquy and the attempt to put the judge's conduct into the record which the judge treats as insolence rather than the questions which were asked by petitioner of the witness Steerman. The questions asked by the petitioner came at the beginning of the examination of Steerman and there was no controlling ruling as to the admissibility of any testimony from this witness. Counsel did only what he was duty bound to do as the court below ruled in *Billeci v. United States*, *supra*, p. 402.

(42) June 10, 1952 (R. 228). Petitioner was examining a witness on direct examination when one of his questions was excluded by the judge. Petitioner thereupon attempted to make a proffer of evidence as to what the testimony would show and the following occurred:

THE COURT: Now make your tender and make it quickly and briefly.

MR. OFFUTT: I want to show by this witness that—

MR. McLAUGHLIN: If your Honor please, I think he ought to ask the questions and see whether or not they are admissible.

THE COURT: No. I excluded the whole line of inquiry.

MR. OFFUTT: This is just a tender of proof, Your Honor. Shall I go ahead, Your Honor—he objected, I take it—I want to show by this witness that Mrs. Mary Lee Ott told Mrs. Steerman that her husband was down at Quantico, Virginia—

THE COURT: I am going to exclude all that. That is immaterial. We will stop further tenders. I will ex-

clude that whole line of inquiry. I told you before, I told you the day before yesterday, I will not permit any testimony as to the personal lives of these people, except as they are connected with this case.

MR. OFFUTT: All right.

Here we have an invitation by the judge for counsel to make a tender; when the tender is made it is cut off and then counsel finds himself adjudged guilty of contempt. This situation we believe requires no discussion.

(44) June 10, 1952 (R. 234-235). In the direct examination of the witness Brown, petitioner asked the witness:

MR. OFFUTT: I direct your attention to this lady who is seated here in the first row of the courthouse, here, in the light blue dress. Do you know her?

ANSWER: Yes, I do.

MR. OFFUTT: And what is her name?

ANSWER: Beg pardon?

MR. OFFUTT: What name do you know her by?

ANSWER: Mrs. Christianson.

The prosecutor objected although the witness had answered. In such circumstances, the proper procedure on the part of the prosecutor would have been to move to strike the answer, although it is difficult to understand the nature of the objection. The prosecuting witness was being identified by the witness on the stand. The judge said:

And I gave you considerable leeway on cross-examination because she was a key witness for the Government, and you were entitled, as a matter of right, to leeway in cross-examination, but I am not going to permit you to call witnesses to blacken her character, and I have told you that before.

We submit petitioner acted within permissible limits when he requested the witness Brown to identify the prosecuting witness because that witness knew her by another name and stated so for the record. Petitioner informed the

judge he did not have in mind the purpose mentioned by the judge and asked that the judge correct any impression his statement might have made on the jury. The judge refused to so instruct the jury and this was error (R. 281-282, footnote 14). It is a fundamental rule of trial practise that until a question is asked and the ruling of the judge obtained, that trial counsel would have no way of knowing in advance the position of the court. Here petitioner preserved his point for appeal as was his duty and was not guilty of any contemptuous act in performing that duty.

SPECIFICATION SIX.

On Several Occasions He Asked of Witnesses Questions That Were Highly Prejudicial to the Witness and for Which There Was No Foundation. Thus He Asked Mary Ott, the Victim of the Abortion Charged Against the Defendant, "When Were You Arrested in This Case?" As a Matter of Fact, She Had Never Been Arrested and When Called to Account by the Court, Offutt Only Answered That He Had a Right to Ask Whether the Witness Had Been Arrested in This Case.

A court should hesitate to suspect counsel of not asking questions in good faith, especially where the propriety of the questions is debatable. *Leland v. Empire Engineering Co.*, 135 Md. 206, 108 Atl. 570. While petitioner was cross-examining the complaining witness, Mary Ott, he asked the question (R. 50):

By the way, when were you arrested in connection with this case?

Thereupon the following colloquy occurred (R. 51-52):

THE COURT: You had no right to say when she was arrested.

MR. OFFUTT: I have no right to inquire as to whether she was arrested?

THE COURT: You did not ask her that. You asked when she was arrested.

MR. OFFUTT: That's right.

THE COURT: That assumes that she was. I am going to make a statement before the jury that that is an improper question.

MR. OFFUTT: I want to ask her if she was arrested.

MR. McLAUGHLIN: They couldn't arrest her.

MR. OFFUTT: They certainly could.

THE COURT: Well, did they?

MR. McLAUGHLIN: No.

THE COURT: Don't you know.

MR. OFFUTT: The officers won't talk to me. Mr. McLaughlin told them not to talk to me.

THE COURT: I think that that was quite proper but you could ask Mr. McLaughlin.

MR. OFFUTT: I will put him on the stand and ask him.

THE COURT: Why would they arrest her?

MR. OFFUTT: Because of a number of things.

THE COURT: On what charges?

MR. OFFUTT: They could arrest her on adultery; they could arrest her on fornication——

THE COURT: That's silly.

MR. OFFUTT: Is it silly?

THE COURT: Yes.

In this colloquy petitioner was right in his contentions and both the prosecutor and the judge were wrong. The Ott woman was living in fornication and adultery with Christianson, a felon and a married man. He was the cause of her pregnancy. She and Christianson were both liable to arrest and trial, under District of Columbia Code (1940 Ed.), Title 22, Sections 301 and 1001. At the conclusion of this colloquy the judge directed petitioner to return to the counsel table, since this colloquy took place at the bench. At the time of the occurrence there was no indication by the judge that he considered petitioner's premise false and the judge ruled at the bench that it was "quite proper" for petitioner to ask Mrs. Ott instead of "when," "whether" she was arrested. From the record it is obvious counsel misunderstood his own question and the judge agreed with the general tenor of the question but objected only to the form of it and characterized petitioner's position as "silly" rather than as false. While it is true that counsel did ask the quoted question, we submit that that was proper, as he was cross-examining the witness. More-

over, we submit that the incident which followed, together with the court's instructions to the jury, eliminated any possibility of a misunderstanding. Accordingly, it is puzzling indeed to find at the end of the case that the judge would charge the petitioner with a falsehood under the circumstances disclosed by the record. When the judge ruled that the question as framed was improper counsel proceeded with his examination. We fail to find any contempt in this situation.

(60) June 5, 1952 (R. 151). The complaining witness' paramour, George Christianson, was testifying. It should be remembered that he was an accomplice in procuring one of the abortions charged to the defendant and was the cause of the complaining witness' pregnancy. The testimony also disclosed that Christianson at the time of the trial was in jail for conviction of a felony. The questions propounded to him by petitioner concerning whether or not Christianson had tried to convince the complaining witness as to whether she should or should not have the baby were proper under these circumstances. In previous testimony this witness had vacillated and been uncertain. While Christianson had denied that he had tried to convince the complaining witness not to have the baby, he allegedly accompanied her on at least two visits to procure an abortion. Further, there was testimony that he had furnished some of the money for the abortion. Petitioner should have been allowed full leeway to develop whether or not Christianson was actually an accomplice in and a procurer of the abortion. Christianson was an accomplice and under District of Columbia law was indictable as a principal. *Thompson v. United States*, 30 App. D. C. 352. Once one is shown to be an accomplice, credibility is affected and the jury must be instructed to weigh such testimony with great care. *Freed v. United States*, 49 App. D. C. 392, 266 F. 1012; *Borum v. United States*, 61 App. D. C. 4, 56 F. 2d 301; *Egan v. United States*, 52 App. D. C. 384, 287 F. 958. This citation does not sup-

port the charge that a question based on a false premise was asked by petitioner.

No other citations are given by the trial judge nor by the respondent, nor in the Appendix to the respondent's Brief, which support specification six. Hence we submit this specification is without foundation.

SPECIFICATION TWELVE.

He Constantly Tried to Create An Episode That Might Cause the Court to Direct a Mistrial.

We submit that the record will reveal that petitioner believed that he was subjected to harsh and improper treatment coming from the prosecutor and the trial judge, in addition to harrassment. Instances of such treatment have been discussed earlier in this Brief. Petitioner's personal integrity was impugned time and time again by the judge and the prosecutor. He was accused of being stupid (R. 55) and at another point with losing his mind (R. 225). The atmosphere of the trial was such that it upset petitioner. In this strained situation petitioner was attempting, however inadequately, to protect his client, preserve his record and to some extent his own personal reputation. Not only does the record indicate that petitioner was abused by the judge, but he was also abused by the prosecuting attorney (R. 46, 88, 105, 127-128, 137-138, 179-180, 218). When petitioner objected to the prosecutor's misconduct, the judge never rebuked the prosecutor but continued to chide and belittle petitioner. An attorney conducting a trial of a criminal case is entitled to such treatment from the court that the interests of his client may not be prejudiced, not as a matter of indulgence, but of right. *Grock v. United States*, 53 App. D. C. 146, 289 F. 544.

The judge should not comment unfavorably in the presence of a jury on the conduct of the trial by counsel for one of the parties. *Christman v. Union Railway Co. of New York City*, 205 N. Y. Supp. 594, 210 App. Div. 104. The

judge should not belittle arguments of counsel. *Weinberg v. Pavitt*, 304 Pa. 312, 155 Atl. 867. He should overrule such arguments with dignity and should not ridicule counsel. *Schafer v. Thurston Mfg. Co.*, 48 R. I. 244, 137 Atl. 2. It is improper for a judge to rebuke counsel in the presence of a jury for asking a question which counsel deems proper. *Cooke v. Glassheim*, 202 N. Y. Supp. 599, 207 App. Div. 592. Accordingly, we submit that specification twelve, which has no citations to support it, is without merit.

While the court below divided on the ultimate effect on the trial "of degrading and belittling remarks directed at defense counsel by the judge, restrictions upon cross-examination, the judge's assumption of the function of an advocate, lack of impartiality, and prejudicial remarks by the prosecutor", the majority of the court below were convinced that the judge's conduct "demonstrated a bias and lack of impartiality," which necessitated reversal (R. 281-282). All three judges agreed that the actions of the trial judge "in treading the area reserved for counsel" created conflict and engendered remarks and attitudes on the part of both court and counsel which afflicted the trial (R. 282). In such circumstances we do not see how the objections of petitioner to the judge's improper conduct and to the misconduct of the prosecutor and the motions which petitioner made for a mistrial because of this misconduct can be twisted into contempt on the theory that in making his valid objections and his proper motions, petitioner tried to create an episode which might cause the judge to declare a mistrial. The situations cited by respondent in its Brief (Br. pp. 12-24, Appendix B, pp. 74-82) do not support specification twelve. Accordingly, we again submit that this specification is without merit.

REPLY TO RESPONDENT'S SUMMARY OF ARGUMENT.

I.

Respondent's contention (Br. 25) that petitioner instigated and is primarily responsible for the altercations and incidents which marred the trial, we dispute. Early in the trial, on June 4, 1952, the judge showed his hostility to petitioner first, not because of any questions which petitioner was asking, and threatened petitioner with jail because he in a courteous manner attempted to object to certain mannerisms of the judge and signals being made by the judge to the prosecutor. Thereafter, when any objection was made or any motion was made by petitioner seeking to place in the record the personal mannerisms and misconduct of the judge, those objections and motions were treated as acts of insolence by the judge. This was the crux of the controversy which marred the trial and the primary hostility and first provocation came from the judge and not from the petitioner, and this is what we believe the court below decided when it said (R. 280, 281-282):

Hostility to counsel was at times displayed by the Court * * *

* * *

The numerous comments to defense counsel * * * demonstrated a bias and lack of impartiality which * * * necessitates reversal.

and when it held the judge invaded "the area reserved for counsel, thus creating conflict * * * which afflicted the trial." (R. 282).

II.

Respondent argues (Br. 25-26) on the erroneous premise that the hostility displayed by the trial judge (R. 280) was caused by petitioner's conduct, petitioner, therefore, can be subjected to a summary judgment of contempt. Respondent argues that if petitioner could escape such punishment, all that any contemnor need do in order to escape

punishment is to resort to conduct calculated to provoke the judge into making prejudicial and hostile comments. Hence respondent says (Br. 25) "sharp retort" from the judge, his disturbed "imperturbability" and his "hostility" show "no basis for disqualifying" him. Of course this is not the law. Due process requires that the judge imposing a sentence be impartial. Provocation begs the point. We submit that respondent skirts the basic constitutional question involved. Respondent's argument narrows down to the contention, if a judge who imposes sentence on an attorney confines his "hostility" to those instances wherein there is a disagreement between the judge and the attorney, that such a hostile judge can still impose a summary contempt judgment against the attorney because of the attorney's conduct in these areas of disagreement. Respondent says that where a judge shows such hostility, that does not mean that he is in any way incapable of fairly adjudicating whether an attorney in disagreement with the judge was guilty of contempt. We cannot agree with this tenuous argument. Regardless of what causes a trial judge to manifest bias, hostility and lack of impartiality, if that bias, hostility and lack of impartiality are shown affirmatively during the course of the trial, it makes no difference what brought that hostility into the open.¹ Every accused in any trial, summary or otherwise, is entitled to an impartial judge. *Tumey v. Ohio*, 273 U. S. 510. Respondent's argument that all mitigating factors were considered in reducing the sentence misses the constitutional question. As here, it was vigorously argued in *Tumey v. Ohio*, *supra*, that a full hearing was afforded the accused by the interested judge who presided, the evidence clearly showed the accused was guilty of the offense charged and because the sentence was the minimum sentence any judge could impose that the accused could not complain of a denial of due process of law because he was tried by

¹ The remarks of the trial judge in committing petitioner show a prior bias and belief that petitioner should be purged (R. 259-260).

an interested judge. This Court in the *Tumey* case ruled (p. 535) that such arguments do not dispose of the due process question and no matter what the evidence is against an accused, he has the right to have an impartial judge try him. As this Court has decided, if the judge is interested in the outcome of the case or is hostile or prejudiced, the Fifth and Fourteenth Amendments require that the judge be disqualified, because the Nation is entitled to the assurance that every judge is impartial and is free from any bias or prejudice which might disturb the normal course of impartial judgment. And it makes no difference that the lack of impartiality arises during the trial. *Berger v. United States*, 255 U. S. 22, 35, 36.

The contention asserted by the respondent was also before the court below in *Whitaker v. McLean*, 73 App. D. C. 259, 118 F. 2d 596. In the *Whitaker* case, a felon was seeking to recover money from Mrs. McLean in connection with certain actions he had taken relating to the kidnapping of the Lindberg child. The testimony of the plaintiff Whitaker was provoking and shocked the conscience of the trial judge. The judge *at a bench conference* indicated that he did not believe Whitaker's testimony and characterized Whitaker unfavorably. At the conclusion of the evidence, the trial judge directed a verdict for the defendant, Mrs. McLean. This action was reversed on appeal and a new trial ordered because the judge in making his comment at the bench had displayed hostility toward Whitaker, which the court below held to be a form of bias. Notwithstanding that the testimony and conduct of the plaintiff provoked this comment at the bench and notwithstanding that the court below recognized that judges are not forbidden to feel sympathy or aversion for one party or the other, the court nevertheless held that every party is entitled to a trial by a judge free from bias as an inherent part of a fair trial. As the court below found, if a judge's hostility appears during a trial, that disqualifies him and he may not thereafter enter a judgment in the cause. The *Tumey*,

Berger and *Whitaker* decisions should be a complete answer to the fallacious argument of respondent that "hostility" to a defendant, because provoked, does not disqualify a judge.

REPLY TO RESPONDENT'S ARGUMENT.

I.

As we have pointed out, respondent prefers to argue the merits of the remaining four specifications of the contempt citation before discussing whether they were entered by a hostile and biased judge. Accordingly, respondent contends that petitioner was guilty of contempt and cites *Sacher v. United States*, 343 U. S. 1. It is argued that the bulk of the incidents resulted from two methods of approach of petitioner. First, it is argued petitioner persisted in making irrelevant objections and exceptions in order to provoke a mistrial (Br. 27). Second, it is argued that petitioner attempted to introduce evidence which was irrelevant to confuse the jury and to besmirch witnesses and humiliate the prosecutrix, her mother and her friends (Br. 27-28). In support of these contentions certain references are made to the record as examples of petitioner disregarding the rulings of the judge. We have taken every citation on which the judge relied in his certificate and have discussed them in context in our reply to respondent's statement (pp. 9-45, *supra*). We submit on the merits that the quoted instances fail to show any deliberate violation of the judge's rulings. Nor does the fact that the judge on some occasions permitted petitioner to make other objections (Br. 28) in any way aid the contempt citation. We do not believe that this Court is concerned with the details of the trial below which do not relate to the contempt citation. Nor can we agree with respondent's contention that the manner in which petitioner attempted to introduce evidence is contemptuous. Petitioner's manner was courteous at all times. Hence

the case of *Hollinan v. United States*, 182 F. 2d 880, is not helpful here. Nor does the record show any deliberate design on the part of petitioner to defy rulings of the judge, but, on the contrary, affirmatively shows petitioner did his best to comply with such rulings and yet at the same time protect the interests of his client in connection with those rulings by making a proper record.

Respondent next erroneously brands petitioner's objections to the personal mannerisms and conduct of the trial judge as "rude and discourteous" (Br. 29). Respondent makes the belated argument that petitioner did not comply with the fundamental requirement of the *Butler*, *Billeci* and *Vinci* cases, that objections to the gestures of the trial judge should be made out of the hearing of the jury. This Court should bear in mind in considering this belated contention that nowhere does Judge Holtzoff treat the making of the objections "in open court" as a basis for a contempt. Moreover, the making of objections in open court or at the bench is under the control of the trial judge and not counsel. While it may be preferable that such objections be made at the bench, the matter is still under the control of the judge. The judge, not counsel, controls the trial. On at least ten occasions prior to R. 81, the first example cited by respondent (Br. 28), petitioner's requests to approach the bench were denied and the judge instructed petitioner to make objections, motions and proffers in open court. (Tr. 332, 385). Thus the judge ruled (Tr. 332):

I think you should apply * * * in open court * * *
I don't like to keep things from the jury * * * I think
the jury should know what is going on.

And in denying bench conferences to petitioner ruled (Tr. 385):

You make any statement you wish.

Respondent's argument that petitioner's objections to the conduct of the judge were deliberate insolence and were made in open court for the purpose of "baiting" the judge, is unsound. An examination of the record reveals that petitioner requested the right to approach the bench on ninety-nine occasions. Only twenty-six of these requests were granted and seventy-three were denied. As we have shown early in the case the judge ruled that any statement which counsel wished to make could be made before the jury (Tr. 385). Actually, the trial judge made it plain prior to the June 4th incident that he favored the making of all objections and their disposition in the presence of the jury and that he frowned upon bench conferences (Tr. 332). How under these circumstances respondent can argue with any justification in the record that petitioner was guilty of contempt because certain of his objections and motions occurred in open court, we cannot understand.

In answer to respondent's contention that petitioner was "baiting" the judge, we submit that an examination of each citation of the judge and of each citation relied upon by the respondent will show that petitioner always addressed the judge in a courteous manner in making his objections, his proffers and his motions. Whereas, on the other hand, in these instances petitioner was abused and belittled by the judge and the prosecutor. In these circumstances, we pose the question of who was doing the "baiting."

Respondent also attempts to make something of the fact that petitioner asked of the prosecutrix: "When were you arrested?" (Br. 31). We fully discussed this question in our reply to respondent's statement (pp. 41-43, *supra*). The judge ruled that it was proper to ask this witness if she were arrested, but stated that he did not feel counsel should use the word "when" as that inferred she might have been. The legal niceties of this situation hardly spell out contempt, bearing in mind that petitioner was cross-ex-

ing the witness and had the right to ask leading questions when the record shows that the police officers had been instructed by the prosecutor not to discuss this case with counsel for the defendant (R. 51). The statement of respondent that petitioner knew that she had not been arrested (Br. 31) is contrary to the record which affirmatively shows that petitioner did not know that she had been arrested and was unable to obtain this information because of the instructions of the prosecutor that the officers and witnesses for the prosecution should not talk to the petitioner about the case (R. 51).

Respondent also makes much of petitioner's abortive attempt to examine Mrs. Hodges, the mother of Mrs. Ott (Br. 31). Mrs. Hodges had been served with a subpoena *duces tecum* because petitioner believed from information in his possession that she had been in correspondence with his daughter, Mrs. Ott, and the correspondence would tend to establish the defendant's innocence (R. 66). Mrs. Hodges lived in Erie, Pennsylvania. She appeared pursuant to the subpoena. Petitioner, as an accommodation to her, offered to examine her out of order. His request was first denied but later the judge, to accommodate the witness, gave permission that Mrs. Hodges be called out of turn and examined by petitioner during the presentation of the prosecution's case. When petitioner attempted to question Mrs. Hodges concerning the subpoena *duces tecum*, obviously for the purpose of finding out whether she had produced the letters in question, without objection by the prosecution, the judge interrupted and excluded this line of questioning. Petitioner objected to the interruption, pointing out that he wanted the opportunity to develop all the facts that he could from this witness for the obvious reason that the materiality and relevancy of her testimony could only be determined after all the evidence was in for the defense. Petitioner believed he should be permitted to examine the witness freely and without interruption, with materiality and relevancy reserved for later decision

when the defense testimony was completed. During this examination the judge signaled objections to the prosecutor. Under these circumstances, petitioner stated he preferred to withdraw the witness and to examine her in her proper place in the presentation of the defendant's case. This reasonable request was denied. Petitioner was ordered to continue with the examination. Petitioner obeyed the judge and the examination of the witness was completed within the limited field permitted (R. 74-79). Respondent's statement that the examination was full of irrelevancies and that petitioner engaged in a tirade finds no support in the record. If the Hodges' examination is considered by the respondent to be a "good example" of contempt, we submit respondent's case rests upon a very slender reed. We flatly disagree with respondent's contention that the efforts of petitioner to show the details of Mrs. Ott's private life and her prior experiences with abortions was a deliberate effort to inject into the record prejudices and irrelevancies as argued by the respondent (Br. 32). We have discussed the relevancy of the evidence attempted to be elicited from Mrs. Ott in our reply to respondent's statement. The record fails to support respondent's contentions that these efforts, which we say were justified by petitioner in the defense of his client, constitute contempt.

II.

A. We cannot accept respondent's argument that the record shows no basis for disqualifying the judge. Nor can we accept respondent's contention that this Court should read into the abortive findings of misconduct willfulness and bad faith, because the judge in his certificate uses the language "insolent," "insulting" and "discourteous." Respondent argues that these words and the repeating of questions and the charging that petitioner tried to create an episode which might lead to a mistrial supply bad motives. This is pure argument. There are no find-

ings of deliberate and willful conduct taken in bad faith in the certificate (R. 25-28). This is a criminal proceeding. Deficiencies in the charge and findings cannot be supplied by argument. Moreover, as we pointed out in our Brief (pp. 27-28) the record shows that the judge here on numerous occasions specifically found that the conduct which resulted in his certificate was not done in bad faith and was not done intentionally by petitioner. (R. 68, 70, 73, 89, 153). As the judge below found that the acts of which he now complains were not intended to be insolent, sarcastic or otherwise disrespectful in the course of the trial, we say it is a little late to attempt to supply missing evil motives in respondent's Brief. The cases cited in footnote 13 of respondent's Brief in no sense meet the requirements which this Court laid down for adjudging attorneys guilty of contempt for violating court orders in *In re Watts and Sachs*, 190 U. S. 1, 32, 35.

Respondent (Br. 32) brushes off our contentions that the court below has found that the conduct of the trial judge showed hostility, bias and lack of impartiality (R. 280, 283-284) and says (Br. 33) that the judge's conduct demonstrated that the bias against petitioner was only a "strong dislike" for petitioner's conduct. As a further support for this argument, respondent states that there is no basis in the record for concluding that the judge had any bias or lack of impartiality towards petitioner's client. While we question the accuracy of this statement, because the court below reversed the conviction of petitioner's client, stating that the "chief factor" therefor was the misconduct of the judge (R. 267),² we will agree that all of the bias, lack of impartiality, hostility and personal dislike coming from the trial judge were directed at petitioner. Proceeding on respondent's premise that the judge's hostility, bias and strong dislike only concerned

² The judge's comments on the return of the verdict show a prior belief in the guilt of the accused which is legal bias and disqualifying (R. 260).

petitioner, it is obvious that the judge is disqualified to act, because due process of law requires that a sentencing judge be free from any bias, hostility and lack of impartiality. This principle obviously is more applicable to a summary proceeding where no defense is allowed an accused and he is denied the right of counsel, because in such circumstances, the judge occupies the role of accuser, prosecutor and the trier of the facts. The degree of bias, hostility or lack of impartiality in summary proceedings is less than that which would be required to disqualify a judge who merely presides over a trial in which there is a defense and jurors are the ultimate triers of the facts. The danger inherent in bias in summary proceedings, which strikes at the roots of due process of law, is far greater than in ordinary trials.

Respondent argues (Br. 34) that we magnify the language of the *Peckham* and *Offutt* decisions and confuse the court's statement of the contentions below with the court's actual holding. We cannot accept this argument. It is true in the *Peckham* case the court below described the questions presented. (R. 281). Therefore respondent argues because the court below was divided over "the effect of these matters on the fundamental fairness of the trial" that we magnified the effect of the opinions below. We submit respondent is in error. The only division in the court concerned the effect "of these matters" on the trial and was whether or not they required a reversal. We submit the majority of the court felt that these matters and others required a reversal. (R. 281-282).

Nor can we accept the subsidiary argument of respondent (Br. 36-37) that petitioner provoked the judge and this is what caused the judge's judicial restraint to give way. While we agree that judge's restraint gave way, yet as respondent admits (Br. 37), it was petitioner who was provoked because the judge invaded counsel's area, excessively injected himself into the examination of witnesses and made numerous hostile comments to petitioner. And

the court below so held (R. 281). Even the dissenting judge in the *Peckham* case was of the opinion that extent of the judge's participation in the proceedings was not required by his obligation to maintain a firm and salutary control of the proceedings, that the judge invaded the area reserved for counsel and thus the judge *created* the conflict which engendered remarks and the attitude on the part of both the court and counsel which afflicted the trial (R. 282). The court below did not say, and the record does not substantiate respondent's argument, that petitioner's conduct created the disorderly atmosphere of the trial. Respondent, while forced to admit that the type of hostility shown by the judge occurred, seeks to evade the disqualifying nature of that hostility by attempting to compare it with the actions of the trial judge in *Dennis v. United States*, 341 U. S. 494 and *Sacher v. United States*, 343 U. S. 1. We say that neither of these cases answers our contention that hostility, bias and prejudice disqualifies a judge from entering a summary contempt judgment against an attorney. The Court of Appeals and this Court in the *Sacher* case held that the trial judge there did not show hostility, bias and lack of impartiality in sentencing the attorneys for contempt in that case. Whereas, here, the court below has found that the trial judge did display hostility, bias and a lack of impartiality. A reading of respondent's brief will show that bias and hostility were displayed by the trial judge and that it disqualified him from entering a summary judgment against an attorney against whom that hostility and bias were directed. *Tumey v. Ohio*, 273 U. S. 510.

We do not see how the argument (Br. 39-40) that the *Peckham* case was reversed because of the failure of the judge to admonish the jury that Peckham was not to be prejudiced because of any conduct of the trial judge can stand because the "chief factor" which led the court below to conclude that Peckham's conviction should be reversed was "the judge's treatment of petitioner" (R. 267).

A rather curious argument is made by the respondent (Br. 40-43), which is, because the judge on many occasions throughout the trial ruled in petitioner's favor, that this shows that the judge was completely fair and petitioner's conduct did not influence his judgment. We are unable to understand how the sustaining of valid objections of petitioner cures the prejudice resulting from the "excessive injection of the trial judge into the examination of witnesses, numerous comments to defense counsel, indicating at times hostility" which "demonstrated a bias and lack of impartiality" (R. 281).

B. We find nothing in the quote from *Sacher v. United States* (Br. 44) which answers our contention that the judge in a summary contempt proceeding must be neutral and must not be biased against an attorney. We think respondent admits (Br. 45) that when a judge's conduct shows that he acted "unreasonably" or "arbitrarily," that conduct "wholly incapacitated" him from acting judicially. Hence, respondent's argument (Br. 45) that the record does not show any bias on the part of the trial judge against petitioner is unsound and the court below has found to the contrary. (R. 280-281). In this connection, respondent cites *Fisher v. Pace*, 336 U. S. 155 (Br. 46). In the *Fisher* case, an adjudication of contempt was entered by a Texas court because of violations of certain rulings of the trial court occurring in open court. On appeal, the highest court of Texas affirmed but sharply divided. This Court divided five to four in affirming the contempt, the majority holding that the Texas court had power to punish certain contempts occurring in the face of the court under Texas law. Justices Douglas, Black, Murphy and Rutledge vigorously dissented. The dissent states that the summary contempt power should be exercised with delicate care otherwise it becomes an instrument of tyranny (p. 136), that freedom of speech in the courtroom deserves the same protection as freedom of speech outside the courtroom (p. 163), and that this Court should never permit a

lawyer to become the victim of the pique of a judge because if a judge intends to be unfair, the trial of the lawyer would be a farce (pp. 166-167). As the dissent shows (p. 169), *whatever the provocation* there can be no due process in a trial, summary or otherwise, "in the absence of calm judgment and action untinged with anger from the bench." We do not quarrel with the respondent's statement that the object of contempt proceedings is to assure order in the court and to prevent justice from falling into disrepute. We also agree that its great and only purpose is to secure the judicial authority from obstruction in the performance of its duties and that the minimum exercise of this power necessary for the preservation of public order is all that should ever be exercised in a given case. *In re Oliver*, 333 U. S. 257; *Ex parte Hudgings*, 249 U. S. 378; *Cooke v. United States*, 267 U. S. 517.

There has been no obstruction to the performance of judicial duty by petitioner here. On the contrary, petitioner was only exercising the legitimate functions of trial counsel as required of him by his oath as an attorney and the Sixth Amendment. If trial counsel are to be imprisoned summarily without a hearing by biased and prejudiced judges, the right of advocacy will have been dealt a death blow.

In answer to the general tenor of the respondent's arguments, we again state that the difficulties in the trial resulted from the judge's sensitivity to objections concerning his mannerisms and personal conduct, his excessive injection into the area reserved for counsel and his angry comments to petitioner. The first real flare-up came on June 4, 1952 (R. 81-82) when petitioner attempted to have the record show certain conduct of the judge occurring in the presence of the jury. The judge obviously became angry and threatened petitioner with jail if he persisted in making such objections. Carrying out the threat implicit in this warning, the judge treated this effort and every effort

of petitioner thereafter to have the record reflect the actions, personal mannerisms and conduct of the trial judge as a basis for fourteen contempt charges (R. 81-82, R. 313-314, R. 146, R. 154-155, R. 157-158, R. 177-179, R. 195-196, R. 209-210, R. 221-222, R. 228-229, R. 229-230, R. 172-173, R. 226-227, R. 215-216). The judge's findings of contempt are based upon the making of the objections, whether in open court or at the bench, and the objections themselves are treated as insolence and were so characterized. How are prejudicial mannerisms, gestures and movements of a judge to be shown? They do not appear in the record. How is an appellate court to evaluate these matters to insure a fair trial? Of course, the best means would be a motion picture, but we have none. Where a recording is not available, the last resort is a word description of the questioned conduct. Certain words evidence emotions. The record here shows gestures, expressions and judicial movements. Remarks coming from a judge like "stupid," "insolent", a charge of losing one's mind, and the like, are emotional and are accompanied by facial expressions and usually by gestures and bodily movements. Such words and such conduct can prejudice a case. As this Court knows, the place to win cases is in the trial court. If a lawyer feels his client's defense is being prejudiced by the conduct of a trial judge, he must act. When cut off or if he is cowed into inaction, an appellate court could rule in favor of a judge because of an inadequate record. The *Butler* and similar cases attempt to bring this forbidding situation to the attention of appellate courts for correction. An attorney should not be held in contempt for following these decisions nor should he be required to make objections at his peril. We do not think it is sound to argue that the making of such objections insult a trial judge and provoke him. If the judge does not agree with the factual statements contained in the objection or motion describing his mannerisms and conduct, he is free to place his

version in the record for appellate review. No objection made to the judge's conduct here was ever questioned factually by the judge or the prosecutor. When the instances of alleged contempt, which involve criticisms of the judge's conduct are read in context, and are considered in the light of the judge's conduct, we submit that petitioner's valid objections thereto were probably responsible for the other unfounded contempt citations in the certificate. Moreover, in the atmosphere of the trial, petitioner was obviously confused (Tr. 51, 72, 575, 751, 968, 1032, 1070, 1599), had difficulty hearing (Tr. 51, 72, 574, 575, 578, 764, 841, 968-969, 1007, 1032, 1099-1100, 1146, 1203, 1389, 1448, 1453, 1455, 1466, 1470, 1478) and was ill (Tr. 222, 327, 392, 398, 886, 1432, 1527). He certainly was confused by the inconsistent and contradictory rulings of the judge below and his threatening attitude, which we will paraphrase from the record:

Yes, you may come to the bench. No, you may not come to the bench. Don't ask a question that violates my ruling. I will not answer questions on my rulings. Ask your questions. I don't rule in advance on questions. Don't you dare repeat questions. Make your proffer in open court. No, I will cut off all proffers. etc.

Certainly the confusion of petitioner in such a confused situation is understandable and is not contempt.

CONCLUSION.

We again submit that petitioner, trial counsel in the criminal case below, as best he could, only attempted to do his duty honestly and, as he understood that duty, to protect the rights of his client, the trial judge was disqualified to sentence petitioner, he is not guilty of the remaining

charges of contempt lodged against him and the unwarranted and summary judgment entered by that judge should be reversed.

Respectfully submitted,

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WILLIAM E. WELLY, JR.

No. 80-87

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM E. WELLY, JR.

Respondent

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 589

DORSEY K. OFFUTT, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE DIS-
TRICT OF COLUMBIA CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 264-267) is reported at 208 F. 2d 842.

JURISDICTION

The judgment of the Court of Appeals was entered on November 19, 1953 (R. 268), and a petition for rehearing was denied on December 14, 1953 (R. 303-304). On January 13, 1954, Mr. Chief Justice Warren entered an order extending the time for filing a petition for a writ of certiorari to

and including February 12, 1954 (R. 307), and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether the fact that the trial judge reproved an attorney, at times in stern language, prevents the trial judge from summarily punishing the attorney for contempt.

STATUTE AND RULE INVOLVED

18 U.S.C. 401 provides that:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 42, Federal Rules of Criminal Procedure provides:

(a) Summary Disposition.

A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall

recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing.

A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT

Petitioner was convicted, in the United States District Court for the District of Columbia, of contempt of court, in violation of 18 U.S.C. 401(1), based on his alleged misconduct in the presence of the court in the course of acting as attorney for the defendant during the trial of the case of *United States v. Henry L. Peckham* (R. 25-29). The con-

viction, as to four of the trial court's 12 specifications of contempt, was affirmed by the Court of Appeals, but that court reduced the sentence from 10 days to 48 hours because of its view that the petitioner's conduct was inseparable from that of the trial judge (R. 266-267, 268).¹

The order and specifications of contempt insofar as they were sustained by the Court of Appeals are as follows:

Pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure, I hereby certify that I saw and heard the contempts of court hereinafter described, and that they were committed by Dorsey K. Offutt in the actual presence of the court during the trial of a criminal proceeding before me entitled *United States v. Henry L. Peckham, Jr.*, commencing May 27, 1952, and ending this day. Said Offutt was counsel for the defendant in that case.

I find that said Offutt was guilty of the following breaches of decorum and offensive, contumacious, and unethical conduct in open court during the trial; and that said breaches and course of conduct constitute contempt of

¹ The Court of Appeals stated:

"* * * Appellant's conduct cannot fairly be considered apart from that of the trial judge. Each responded to great provocation from the other. The judge's treatment of appellant, examples of which are included in an appendix to our opinion in *Peckham v. United States*, decided today, and which is the chief factor in leading a majority of this court to conclude that Peckham's conviction cannot stand, leads us all to conclude that appellant's sentence should be reduced from 10 days to 48 hours. * * *

The *Peckham* opinion appears at pp. 269-290 of the present record. See especially pp. 281-290.

court. The transcript of proceedings at the trial is hereby made a part hereof by reference. The citations herein * * * are intended to be illustrative and not exhaustive.

1. On numerous occasions, he made insolent, insulting and offensive remarks to the court, and was guilty of gross discourtesy to the court.

* * * * *

2. On numerous occasions, he persisted in repeating questions, previously excluded by the court, in order to evade the court's rulings, in spite of admonitions by the court to the contrary. Many of these questions were obviously intended to besmirch a witness. * * *

* * * * *

6. On several occasions he asked of witnesses questions that were highly prejudicial to the witness and for which there was no foundation. Thus, he asked Mary Ott, the victim of the abortions charged against the defendant, "When were you arrested in this case?" As a matter of fact she never had been arrested and when called to account by the court, Offutt only answered that he had a right to enquire *whether* the witness had been arrested in this case. [R. 50-52.] * * *

* * * * *

12. He constantly tried to create an episode that might lead the court to direct a mistrial.

Wherefore, it is * * * Ordered, Adjudged, and Decreed, that said Dorsey K. Offutt is

guilty of criminal contempt of court as aforesaid, and that he be committed to the custody of the United States Marshal for the District of Columbia, for a period of 10 days.

(S.) ALEXANDER HOLTZOFF,
United States District Judge [R. 25-29.]

As exemplary of the first specification of contempt, the trial court made a number of references to the record (R. 26). These included the following:

(1) June 4, 1952 (R. 78-79).

At the petitioner's direction, a subpoena had been served upon Mrs. Hodges, mother of the complaining witness, in Erie, Pennsylvania, requiring her presence in the District of Columbia for the purpose of testifying as a defense witness (R. 24-25). In response to the subpoena, she arrived in the District on June 1, 1952 (R. 79). On June 4, the trial court was informed that Mrs. Hodges, as the result of her forced absence from her home and six children, was in financial difficulties (R. 75). At the suggestion of the prosecuting attorney, the petitioner requested leave to call the witness out of turn (the Government had not at this time concluded its case) (R. 76). The request was granted and Mrs. Hodges took the witness stand. After answering several preliminary questions, she was asked to state the number of years the complaining witness had lived away from Erie. The prosecuting attorney's objection to the question was sustained (R. 78.) She was then asked if she was before the

court in response to a subpoena. The court of its own motion excluded the question as immaterial. The following colloquy then occurred:

Mr. Offutt: If your Honor please, if I am going to have interruptions like this, I don't want to examine the witness at all. I want to examine this witness and I want to have free opportunity to present what I have.

The Court: Now, you are getting insolent.

Mr. Offutt: I don't mean it insolently.

The Court: You will have to conduct your examination within the framework of the rules of evidence as the Court construes them. Now, proceed.

Mr. Offutt: Well, I will have to wait until I present my case.

The Court: You may proceed now.

Mr. Offutt: Are you ordering me to proceed? I would rather wait now until my case is over.

The Court: I direct you to proceed.

Mr. Offutt: May I object to being ordered to proceed at this time? [R. 79.]

(2) June 4, 1952 (R. 81-82).

During the course of his examination of Mrs. Hodges, the petitioner asked the witness when she had first discussed the Peckham case with him. Before a response was made, the court announced that it would not permit the disclosure of any conversation between the witness and the petitioner. The petitioner withdrew the question (R. 79). Shortly thereafter, however, he posed substantially

the same question, but in a somewhat different form. An objection was immediately interposed by the prosecutor and sustained by the court. The petitioner then stated in open court:

If Your Honor please, I object to Your Honor raising your hand and leaning forward and looking at the District Attorney before he makes an objection [R. 81].

The petitioner was immediately called to the bench and told that if he persisted in such conduct he would be sent to jail at the close of the trial (R. 81).

(3) June 6, 1952 (R. 161-162).

The Government's first witness in the Peckham case was Mrs. Ott. After having concluded her testimony, she remained in the courtroom as a spectator. When her mother, Mrs. Hodges, was subsequently called as a defense witness, petitioner requested that Mrs. Ott be excluded from the courtroom. The court denied the request, explaining that it was the uniform practice of the District Court, that witnesses who had testified were permitted to observe the remainder of the proceeding. Despite the explanation, the petitioner renewed his objection to the presence of Mrs. Ott and the following discussion occurred:

The Court: After her testimony is concluded, she can sit any place she likes. Any witness who has testified may remain in the courtroom as a spectator, and the mere fact the witness may be called for rebuttal is no reason for the Court not permitting the witness

to remain. We were over that yesterday, Mr. Offutt. Please don't repeat it.

Mr. Offutt: I object to the long speeches about it, your Honor; I just made an objection and I asked your Honor to rule on it, that's all.

The Court: You object to what?

Mr. Offutt: I object to——

The Court: You object to what?

Mr. Offutt: I object to the long dissertation about it. I made no argument; your Honor has not permitted me to make any argument, and I merely object to Mr. McLaughlin——

The Court: I think you are getting very discourteous to the Court.

Mr. McLaughlin: May I say for the record, your Honor, in view of your Honor's ruling the other day in regard to the witness, that Mr. Offutt's attitude of raising the question at this time is just to attract the attention of the jury to Mrs. Ott; that's all. It is just for an ulterior motive. [R. 161-162.]

(4) June 10, 1952 (R. 216-217).

William Jones, one of the several men with whom the complainant had apparently lived during the pertinent period of time, was called as a defense witness. The petitioner asked this witness various questions concerning the private life of Mrs. Ott (R. 181-184, 213). When, in pursuance of this objective, his manner toward the witness became menacing (R. 216), the petitioner was directed to desist. Rather than acquiescing in the court's order, he replied, "If Your Honor please, I object

to Your Honor interrupting me like this; it diverts my attention." (R. 216.)

The trial court included the following incidents as illustrative of the second specification of contempt, that the petitioner on numerous occasions persisted in repeating questions previously excluded by the court, in spite of the court's admonitions, after repeating those questions for the sole purpose, apparently, of besmirching the witness:

(1) June 3, 1952 (R. 54-55).

According to the testimony of Mrs. Ott, one George Christenson had accompanied her to the offices of the defendant, Peckham, at the time of the alleged May, 1951, abortion, and had subsequently assisted her when the fetus was passed. On cross-examination, petitioner asked Mrs. Ott what Christenson had said when informed that she intended to communicate with Peckham relative to the abortion. At this point, the court stated squarely: "Just a moment, I am going to exclude what George Christenson said." Nonetheless, the petitioner then asked Mrs. Ott: "Had George told you that he objected to it [the abortion]?" Again, the trial court stated that it would not permit any statement of Christenson to be admitted through the testimony of Mrs. Ott. But petitioner persisted, asking:

Q. You said that George objected to it. When did he object to it? Give us the date.
[R. 55.]

(2) June 5, 1952 (R. 131-132).

The petitioner asked the witness Kilpatrick on cross-examination if a Dr. Paul Bender had at any time attended Mrs. Ott during her confinement in Mt. Alto Hospital as a result of her second abortion, of January 18, 1952. The court interjected, stating "you may not cross-examine this witness about what some other doctor did," in view of the fact that the questions exceeded the scope of direct examination. Petitioner, nonetheless, continued:

Q. Tell us the names of all the doctors who had anything to do with the treatment of this patient while she was in the hospital?

The Court: I shall exclude that question.

Mr. Offutt: May I finish my question?

The Court: I think you did.

Mr. Offutt: No, Your Honor, I didn't; I am sorry.

The Court: Very well; you may finish your question.

Q. Continuing the question—from the date of her admission, January 18, 1952, until the discharge, February 17, 1952?

Mr. McLaughlin: I object to that, Your Honor.

The Court: This question is excluded as beyond the scope of the direct examination.

Q. Who saw the patient besides Dr. Burke, if any one you know of, before?

The Court: I have excluded that whole line of examination. Don't ask any more questions along that line.

Mr. Offutt: May I know what line you are talking about so I won't transgress it. [R. 131-132.]

(3) June 5, 1952 (R. 151-152).

During the cross-examination of Christenson, the following colloquy occurred:

Q. As a matter of fact, you did not try to convince her to have the baby at all; isn't that right?

A. No, that is not true. I tried it all the time.

Q. Didn't you know that once before, from what she had—didn't she tell you that once before she was to have a baby and she tried her best to stop from having a baby?

A. No.

Mr. McLaughlin: I object, your Honor. There is no such testimony.

The Court: Objection sustained.

Mr. McLaughlin: And I think my friend should be reprimanded.

I object, your Honor.

The Court: Objection sustained, while on cross-examination. Mr. Offutt, I remind you of the fact that I have excluded that matter two or three times during this trial, and I don't want you to try to inject it again. [R. 151-152.]

No fuller reference to the contempts set out in specifications 6 and 12, *supra*, was made than was indicated by the terms of the specifications.

ARGUMENT

The petitioner's principal contention is that the trial judge was without power to adjudicate him

in contempt because the record shows that the judge had himself provoked some of the petitioner's misconduct and thus shown himself to be biased. Relying both on Rule 42 of the Federal Rules of Criminal Procedure and the Fifth and Sixth Amendments to the Constitution, he urges that a biased judge is disqualified to make a summary adjudication of contempt in the absence of some pressing necessity to keep a trial in process.

We reject first the factual premise of this argument. We do not concede that any of petitioner's contempts was provoked by the court, for we think that a fair reading of the record shows that petitioner deliberately set out to provoke the court, and would have continued to do so quite without regard as to what the court itself did. Nor do we concede that the trial court's reproofs to petitioner, though at times abrupt, reveal a bias that made it incapable of fairly and dispassionately adjudicating whether petitioner was guilty of contempt.

But even if it be conceded, as the Court of Appeals states, that the petitioner's "conduct cannot fairly be considered apart from that of the trial judge," each having "responded to great provocation from the other," still, there is no basis for disturbing the judgment below. For this Court's recent decision in *Sacher v. United States*, 343 U.S. 1, is dispositive of the issue thus presented. That case holds first that a district judge may postpone to the end of the trial the imposition of summary punishment on lawyers whose contempts have pervaded the trial. It also holds that the fact that the

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contempt is personal to the judge does not deprive him of this power. The language of the Court on this issue is explicit (343 U.S. at pp. 11-12):

A construction of the Rule is advocated which would deny a judge power summarily to punish a contempt that is personal to himself except, perhaps, at a moment when it is necessary to forestall abortion of the trial. His only recourse, it is said, is to become an accuser or complaining witness in a proceeding before another judge.

The Rule itself expresses no such limitation, and the contrary inference is almost inescapable. It is almost inevitable that any contempt of a court committed in the presence of a judge during a trial will be an offense against his dignity and authority. At a trial the court is so much the judge and the judge so much the court that the two terms are used interchangeably in countless opinions in this Court and generally in the literature of the law, and contempt of the one is contempt of the other. *It cannot be that summary punishment is only for such minor contempts as leave the judge indifferent and may be evaded by adding hectoring, abusive and defiant conduct toward the judge as an individual. Such an interpretation would nullify, in practice, the power it purports to grant.* [Emphasis added.]

Sacher, in short, explicitly recognizes the principle which is decisive here: the mere fact that the trial judge has become perturbed by the conduct of at-

torneys does not deprive him of the power to judge them guilty of contempt; at least, it does not do so in the absence of conduct of the judge which shows, more clearly, that he has cast aside his judicial-responsibilities than is true either of *Sacher* or the present case.

It is true that in *Sacher*, the main case (*United States v. Dennis*, 183 F. 2d 201 (C.A. 2), affirmed, 341 U.S. 494) was not reversed on the basis of the judge's alleged misconduct, whereas it was in the present case. This apparently leads petitioner to the conclusion that there must be a reversal as well of the judgment of contempt against the attorney. But there is a difference between saying, on the one hand, that asperity by the court toward defense counsel may have led the jury to decide the case against the defendant, see *Whitaker v. McLean*, 118 F. 2d 596 (C.A. D.C.), and on the other hand, that the judge's treatment of defense counsel was such as to make unlikely the kind of detached judgment which should precede the punishment even of contemning lawyers. In any event, a comparison of the *Sacher* record with that of the present case reveals that the conduct of the trial court below was quite as restrained, even in the face of apparently deliberate provocation, as that of the trial court in *Sacher*.²

² The petitioner's additional suggestion, which he does not seriously press, that he was entitled to a jury trial was also rejected by this Court in the *Sacher* case.

CONCLUSION

There is no significant legal question presented by this case which was not disposed of in the *Sacher* case. There is hardly a significant variation on the facts. It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

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MARCH, 1954.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

DORSEY K. OFFUTT, PETITIONER

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT**

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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DORSEY K. OFFUTT, PETITIONER

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CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals (R. 264-267) in the instant case is reported at 208 F. 2d 842. The certificate of contempt (R. 25-29) filed by the trial court is reported in substantial part at 208 F. 2d 842-843. The opinion of the Court of Appeals (R. 269-290) in the related appeal of petitioner's client, Henry L. Peckham, Jr., is reported at 210 F. 2d 693.

JURISDICTION

The judgment of the Court of Appeals was entered on November 19, 1953 (R. 268), and a petition for rehearing was denied on December 14,

1953 (R. 303-304). On January 13, 1954, the time for filing a petition for a writ of certiorari was extended by order of Mr. Chief Justice Warren (R. 307) to and including February 12, 1954, on which date the petition was filed. Certiorari was granted on April 5, 1954 (R. 308). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1). See also former Rule 37(b)(2) and Rule 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether petitioner's conduct, involving repeated incidents of various kinds, was properly found to be contempt of court.

2. Whether the District Judge was disqualified from exercising his power summarily to adjudge petitioner in contempt, by reason of his manner of reproving petitioner for improper conduct and his methods of seeking compliance with his rulings, when petitioner disobeyed them.

STATUTE AND RULE INVOLVED

Title 18, U.S.C. § 401, provides:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its law-

ful writ, process, order, rule, decree, or command.

Rule 42, Federal Rules of Criminal Procedure, provides:

(a) Summary Disposition.

A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing.

A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is dis-

qualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT

Pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure, petitioner was found guilty of a series of contempts of court committed during the course of the fourteen-day trial in *United States v. Henry L. Peckham, Jr.*, in the United States District Court for the District of Columbia, before Judge Holtzoff. The Court of Appeals (per Edgerton, Bazelon, and Fahy, J. J.) held that "The record amply supports" a number of the trial judge's specific findings of improper conduct and his "ultimate finding of contempt" (R. 266) and affirmed petitioner's conviction, after reducing his sentence from ten days to forty-eight hours (R. 268).

A. District Court Proceedings

Petitioner was trial counsel for defendant Peckham, who was charged on a two-count indictment with having performed abortions on one Mary M. Ott in May 1951 and January 1952. After a trial by jury, which began on May 27, 1952, and was completed on June 16, 1952, Peckham was convicted on one count and acquitted on the other (R. 47).

On June 16, 1952, immediately after the jury retired to deliberate upon its verdict, the trial judge, after observing that petitioner had failed during

the trial to heed any of the court's "many warnings or admonitions" concerning his conduct, summarily adjudged him guilty of contempt of court and sentenced him "to be committed to the custody of the United States Marshal for the District of Columbia for a period of ten days", but with directions that, upon the return of the jury, petitioner be made available to represent the defendant (R. 256-257, 258). The trial judge also called petitioner's conduct to the attention of the Bar Committee on Admissions and Grievances (R. 257).

The certificate (R. 25-29), which was filed in conformity to Rule 42(a) of the Federal Rules of Criminal Procedure, contains a finding that petitioner was guilty of contempt for "breaches of decorum and offensive, contumacious, and unethical conduct in open court" as seen and heard by the trial judge, and an enumeration of twelve categories of misconduct, supported by a number of references to specific incidents shown in the trial record. This certificate incorporated by reference the entire transcript of proceedings at the *Peckham* trial and stated that the particular instances cited were "illustrative and not exhaustive" (R. 26).¹

The trial was punctuated by numberless incidents on the part of petitioner, which led to his being con-

¹ The record before this Court is made up of a printed joint appendix and the complete typewritten *Peckham* trial transcript, which together constituted the record in the Court of Appeals. References to pages in the printed joint appendix are indicated by (R.) and those in the trial transcript by (Tr.). Record excerpts included in the appendix to this brief are indicated by (Gov. App.).

tinually admonished and reproved by the court— (e.g. R. 55, 56, 59, 60-62, 68, 69, 70, 72, 127, 130-131, 135, 137, 139-140, 148, 152, 153, 158, 162, 174, 179-180, 182, 190, 197, 199, 211, 216-217, 223, 225, 226, 231, 232, 238, 245, 250-252). Petitioner was given repeated warnings that his conduct was regarded as contemptuous and that he was inviting punishment for contempt (R. 81, 88, 142, 180). The details of a few typical incidents are set forth, *infra*, on pp. 12-24, and in Appendix B to this brief (Gov. App. pp. 74-82, *infra*).

B. Court of Appeals Proceedings

On appeal, the Court of Appeals for the District of Columbia Circuit found that the evidence “amply supports” four (see pp. 9-10, *infra*) of the twelve categories of misconduct found by the trial judge as well as his “ultimate finding of contempt” (R. 266).² But it also found that “the record does

² Petitioner's brief incorrectly states (Br. 14) that eight of the twelve sets of contempt findings were reversed by the Court of Appeals. That court did not pass on six of the categories of findings, three of which specified many incidents of misconduct involving frequent boisterousness, belligerence and the use of an offensive tone of voice in addressing the court, matters which necessarily could not be shown by the toneless printed words appearing in the record. However, the court noted that these three sets of specific findings were rendered credible by “Finding 1” (p. 9, *infra*), regarding petitioner's “gross discourtesy” and his “insulting and offensive remarks to the court”, which finding “the record amply supports” (R. 265-266). Only two of the twelve numbered findings were actually set aside (R. 266), one of these because it involved acts not committed in open court.

not support the penalty imposed" in that (R. 266-267):

Appellant's conduct cannot fairly be considered apart from that of the trial judge. Each responded to great provocation from the other. The judge's treatment of appellant, examples of which are included in an appendix [R. 285-290] to our opinion in *Peckham v. United States* [R. 269-290], decided today, and which is the chief factor in leading a majority of this court to conclude that Peckham's conviction cannot stand, leads us all to conclude that appellant's sentence should be reduced from 10 days to 48 hours.

In the *Peckham* case, the majority, in reversing Peckham's conviction by a 2-1 vote, held "that the excessive injection of the trial judge into the examination of witnesses, his numerous comments to defense counsel, indicating at times hostility, though under provocation, demonstrated a bias and lack of impartiality which may well have influenced the jury;³ that, considering these matters and others,⁴ examples of which are set forth in an Ap-

³ This view was based, at least in part, upon the trial court's failure to take the "minimal precautions", even though not requested by the defense, of admonishing the jury, either at the time of the occurrence of the incidents or in the charge to the jury, that the "numerous clashes between defense counsel, on the one hand, and the court and prosecutor, on the other" were not to be taken against Peckham (R. 281-282, fn. 14).

⁴ Including certain alleged errors, unrelated to the clashes between the trial judge and petitioner, which the court below stated "would not, standing alone, amount to prejudicial error" (R. 282, fn. 15).

pendix [R. 285-290] attached hereto, this court is barred from sustaining the judgment as the product of a fair and impartial trial" (R. 281-282).⁵ In conclusion, the court below in the *Peckham* case stated (R. 283-284):

The majority believes that, in the light of the disorderly atmosphere at the trial, it would require too great a degree of speculation to say that the appellant was fairly tried on the issues relevant to the first count. We are all agreed that the misconduct of appellant's counsel which helped produce such atmosphere is for the contempt proceedings against counsel, and scrupulous care must be taken not to weigh such misconduct against appellant.

In referring to its affirmance of petitioner's conviction for contempt of court, the court below stated in the *Peckham* opinion that, "By sustaining the conviction we have expressed our conclusion that counsel was contemptuous, while in reducing the sentence we have reflected our view that his conduct was not altogether separable from that of the judge in treading the area reserved for counsel, thus creating conflict and engendering remarks and attitudes on the part of both court and counsel which afflicted the trial" (R. 282).

⁵ Judge Fahy dissented, believing that the jury had in fact given impartial consideration to the evidence, uninfluenced by any of the incidents which took place during the trial (R. 282-283).

C. Details Respecting Petitioner's Contempt.

The specifications contained in the certificate of contempt, insofar as they were affirmatively sustained by the court below, are as follows (R. 26-29) :

1. On numerous occasions, he made insolent, insulting and offensive remarks to the court, and was guilty of gross discourtesy to the court.

June 4, 1952, pp. 13, 16-17, 291, 297 [R. 79, 81-82, 113, 115].

June 5, 1952, pp. 45, 138, 194 [R. 133, 146, 155].

June 6, 1952, pp. 235-236, 255-256 [R. 157-158, 161-162].

June 9, 1952, pp. 403-404, 490 [R. 179-180, 196-197].

June 10, 1952, pp. 538, 555, 586, 617, 631 [R. 210-211, 216, 223, 229-230, 230-231].

2. On numerous occasions, he persisted in repeating questions, previously excluded by the court, in order to evade the court's rulings, in spite of admonitions by the court to the contrary. Many of these questions were obviously intended to besmirch a witness.

June 3, 1952, pp. 189-191, 200-202, 225, 260-W, 260-Z-1 [R. 54-55, 56-57, 59, 59-62].

June 4, 1952, pp. 21, 322-323 [R. 84-85, 122-123].

June 5, 1952, pp. 25, 38, 52, 121, 161 [R. 129-130, 131-132, 135-136, 144, 151].

June 9, 1952, pp. 374, 382-383, 393-394, 402, 410-411, 462-463, 480, 482 [R. 172, 173-174, 174-175, 178-179, 182, 190, 191-192, 193].

June 10, 1952, pp. 570, 576, 579, 586, 592, 594, 598, 683 [R. 219-220, 220-221, 221-222, 222, 225, 226, 227-228, 235].

* * *

6. On several occasions he asked of witnesses questions that were highly prejudicial to the witness and for which there was no foundation. Thus, he asked Mary Ott, the victim of the abortions charged against the defendant, "*When* were you arrested in this case?" As a matter of fact she never had been arrested and when called to account by the court, Offutt only answered that he had a right to enquire *whether* the witness had been arrested in this case.

June 2, 1952, pp. 99-101 [R. 50-52].

See also, June 5, 1952, p. 161 [R. 151].

* * *

12. He constantly tried to create an episode that might lead the court to direct a mistrial.

A sharp conflict exists between the Government's view, that petitioner initially provoked and is primarily responsible for the altercations with the court, and the impression which petitioner seeks to convey, that his entire course of conduct was a proper response to "great provocation" (Br. 5)

from a hostile and biased judge and constituted "the fearless, vigorous and effective performance of the duties pertaining to the office of advocate" (Br. 7). The resolution of this conflict requires consideration of substantially the entire record of the *Peckham* trial, which was incorporated by reference in the judge's findings of contempt (R. 26), and not merely the instances of altercation which have been compressed into the printed joint appendix,⁶ which omits many rulings in favor of petitioner and fails to disclose the relatively normal atmosphere which prevailed during substantial portions of the trial.

No summarization or selection of excerpts from the trial transcript can properly capture the atmosphere, on the one hand, of those periods of relative calm, when rulings favorable to petitioner and his client were being made (e.g. Gov. App. pp. 51-74, *infra*), and, on the other, the cumulatively improper conduct of petitioner, which gradually subjected the trial judge to an increasing degree of provocation and which gave rise to petitioner's contempt conviction (e.g. pp. 12-24, *infra*, and Gov. App. pp. 74-82, *infra*). As shown by the excerpts and transcript references collected in Appendix A to this brief, great latitude was allowed petitioner on such occasions as he chose to comply with customary standards (Gov. App. pp. 51-74, *infra*).

⁶ This was recognized by the Court of Appeals when it stated: "Appellant's conduct cannot fairly be considered apart from that of the trial judge. Each responded to great provocation from the other" (R. 266).

While it is impossible for any written record to convey the nuances of tone and manner which may, in themselves, be conclusive on the question of contempt, a reading of the entire trial transcript suggests the situation in a way which no excerpts can do. The selectivity necessary in any set of selections, including those found in the printed joint appendix, necessarily results in a disjointed and somewhat distorted view of the record. Here, in a few pages, it is only possible, with a small number of illustrative examples, to suggest a very little of the general atmosphere which the whole record conveys.

(1) *June 2, 1952*

Petitioner states that "the first three days of trial relations between the court and petitioner were without serious incident" (Br. 9). However, the following example of cross-examination, which occurred early in the trial, shows a typical incident and gives an idea of the problem before the court. The first of two principal witnesses for the Government was Mary M. Ott, who had testified that defendant Peckham had twice performed abortions on her. Almost at the start of Mrs. Ott's cross-examination, petitioner began questioning her as to whether she had talked to the prosecutor about the case, when he said (R. 50; Tr. 156):

By the way, when were you first arrested in connection with this case?

After objection by the prosecutor that there was no arrest, the court called a conference at the bench, and the following occurred (R. 50-52; Tr. 157-158) :

The COURT: Just what is the meaning of the question, Mr. Offutt, about the witness being arrested?

Mr. OFFUTT: I want to know when she was arrested.

The COURT: Well, was she arrested?

Mr. McLAUGHLIN: Never.

Mr. OFFUTT: I will ask her that question.

The COURT: You had no right to say when she was arrested.

Mr. OFFUTT: I have no right to inquire into whether she was arrested?

The COURT: You did not ask her that. You asked when she was arrested.

Mr. OFFUTT: That's right.

The COURT: That assumes that she was. I am going to make a statement before the jury that that is an improper question.

Mr. OFFUTT: I want to ask if she was arrested.

Mr. McLAUGHLIN: They couldn't arrest her.

Mr. OFFUTT: They certainly could.

The COURT: Well, did they?

Mr. McLAUGHLIN: No.

The COURT: Don't you know?

Mr. OFFUTT: The officers won't talk to me. Mr. McLaughlin told them not to talk to me.

The COURT: I think that was quite proper, but you could ask Mr. McLaughlin.

Mr. OFFUTT: I will put him on the stand and ask him.

The COURT: Why would they arrest her?

Mr. OFFUTT: Because of a number of things.

The COURT: On what charge?

Mr. OFFUTT: They could arrest her on adultery; they could arrest her on fornication——

The COURT: That's silly.

Mr. OFFUTT: Is it silly?

The COURT: Yes.

Mr. OFFUTT: They could arrest her in connection with a conspiracy; they could——

The COURT: Go back to counsel table, gentlemen.

(Thereupon counsel resumed their places at the trial table, and the following proceedings were had in open court:)

The COURT: The question asked by counsel as to when she was arrested is improper, because it implies that she was arrested. There is no evidence that she was arrested.

Were you ever arrested in connection with this case?

The WITNESS: No, sir.

The COURT: The question was highly improper.

Petitioner then started questioning Mrs. Ott about her admission into Mt. Alto hospital, and the following occurred (Tr. 161-162) :

Q. The man that you had held out to be your husband was there in the Raleigh Hotel with you when you made that call, wasn't he?

A. I didn't hold out——

The COURT: Just a moment. There is an assumption in that question for which there is no basis in the record, as yet.

Petitioner cross-examined the witness as to whether she had not held out one William Jones as her husband, but the witness stated that she never had held out Mr. Jones as her husband (Tr. 162).

(2) *June 3, 1952*

Petitioner's cross-examination of Mrs. Ott was punctuated with a number of incidents when it was continued throughout nearly all of a second day.

In the course of questioning Mrs. Ott as to the time George Christenson⁷ accompanied her to Dr. Peckham's office, petitioner asked what Christenson said when informed that she intended to communicate with Peckham relative to the abortion (R. 54; Tr. 252). At this point, the court intervened, stating: "Just a moment. I am going to exclude what George Christianson [sic] said. That has nothing to do with the case, at this stage of the case" (R.

⁷ Mrs. Ott had testified that she had been living with Christenson and had held him out as her husband, that he had accompanied her to Dr. Peckham's office, and that he had been with her in a hotel room when the foetus involved in the first abortion was passed (Tr. 74, 87, 91, 94, 168-169).

54; Tr. 252). Petitioner continued his cross-examination as follows (R. 54-55; Tr. 253-254):

Q. Had George told you that he objected to it?

Mr. McLAUGHLIN: That is the same thing, Your Honor.

The COURT: I told you, Mr. Offutt, that I shall exclude anything that George Christianson [sic] said to this witness because that is not proper cross examination.

Mr. OFFUTT: I am not going to ask her what he said, Your Honor; I am just going to refer to the objection, that's all, not the conversation.

The COURT: That is another way of getting around my ruling.

Mr. OFFUTT: She has already said that on direct examination, Your Honor.

The COURT: You may proceed, Mr. Offutt. I have made my ruling and you have to comply with it.

Mr. OFFUTT: I can't ask any—you said that—so that I will be clear about it, I can't ask any—

The COURT: Any statements made by George Christianson [sic] to this witness are not proper cross examination, and I will exclude them at this time.

Mr. OFFUTT: All right.

By Mr. OFFUTT:

Q. You said that George objected to it. When did he object to it? Give us the date.

Mr. McLAUGHLIN: Now, he is right back again, Your Honor.

Mr. OFFUTT: I don't want the conversation.

The COURT: Now, Mr. Offutt——

Mr. OFFUTT: I misunderstood Your Honor's ruling.

The COURT: No, I think you understood.

Mr. OFFUTT: I did not, I give you my word of honor.

The COURT: You can't be as stupid as all that. Do not transgress my ruling again.

Proceed and ask another question.

Mr. OFFUTT: All right.

Immediately, thereafter, however, the following occurred (R. 54; Tr. 254):

A. When is the last time you saw and talked to George Christianson [sic] before today?

Mr. Mc LAUGHLIN: I can't see the materiality of that, your Honor.

The COURT: No, I think that is proper.*

As Mrs. Ott's cross-examination continued, other incidents occurred (R. 58-59, 59-61, 64-65, 67-68, 68-69, and 69-70). The following is an example of a typical admonition given petitioner (R. 69; Tr. 384):

The COURT: Don't talk in that belligerent tone to the witness.

* On numerous other occasions during Mrs. Ott's cross-examination the court overruled objections by the prosecution (e.g. Tr. 194, 200, 208, 210, 211, 215, 278, 302, 303, 308, 309-311, 330, 373).

Mr. OFFUT: I didn't mean it that way, Your Honor, I assure you.

The COURT: I am sure you didn't, but still, let it not be done.

Mr. OFFUT: We get a little excited here, Your Honor.

(3) *June 4, 1952*

On June 4, 1952, petitioner requested, and was granted, leave to call a witness out of turn, with the court's assurance that it would not affect his "right to make a motion for acquittal at the close of the Government's case" (R. 76-77; Tr. 415-416). This witness, whom petitioner had subpoenaed to Washington from Erie, Pennsylvania, was the mother of Mary Ott. She was anxious to be excused because she had young children to take care of at home in Erie.

No relevant testimony was extracted from her. After answering several preliminary questions, the witness, Mrs. Hodges, was asked to state the number of years Mrs. Ott had lived away from Erie. The prosecuting attorney's objection to the question was sustained (R. 78; Tr. 418-419). She was then asked if she was before the court in response to a subpoena. The court, of its own motion, excluded the question as immaterial. Thereupon the following colloquy occurred (R. 79; Tr. 419-420):

Mr. OFFUT: If Your Honor please, if I am going to have interruptions like this, I don't want to examine the witness at all. I want to

examine this witness and I want to have free opportunity to present what I have.

The COURT: Now, you are getting insolent.

Mr. OFFUT: I don't mean it insolently.

The COURT: You will have to conduct your examination within the framework of the rules of evidence as the Court construes them. Now, proceed.

Mr. OFFUT: Well, I will have to wait until I present my case.

The COURT: You may proceed now.

Mr. OFFUT: Are you ordering me to proceed? I would rather wait now until my case is over.

The COURT: I direct you to proceed.

Mr. OFFUT: May I object to being ordered to proceed at this time?

Petitioner asked the witness when she had first discussed the *Peckham* case with him. Before a response was made, the court announced that it would not permit the disclosure of any conversation between the witness and petitioner. Petitioner withdrew the question (R. 79; Tr. 420). After the court had overruled some objections by the prosecutor (R. 80-81; Tr. 421-422), petitioner asked about conversation with a member of his office (R. 81; Tr. 422). An objection was immediately interposed by the prosecutor and sustained by the court. Petitioner then stated in open court (R. 81; Tr. 422):

If Your Honor please, I object to Your Honor raising your hand and leaning forward

and looking at the District Attorney before he makes an objection.

Petitioner was immediately summoned to the bench and warned that if he continued making "insolent remarks" he would be sent to jail for contempt of court at the end of the trial. Petitioner replied: "I don't mean it as a discourtesy. Judge Stephens said we should put these things in the record as they happen, and I saw Your Honor did it yesterday, you screamed so and you jumped forward and I thought you had said something". The trial judge then told petitioner: "Go back to counsel table; I have given you my warning" (R. 81-82; Tr. 422-423).⁹

Petitioner continued to cross-examine the witness as to service of the subpoena and her conversations with her daughter after she came to Washington (R. 82-84; Tr. 423-426), the judge overruling several objections by the prosecution (R. 83; Tr. 425; R. 84; Tr. 426). The court suggested that petitioner elicit relevant information from the witness (R. 84; Tr. 427 and R. 86; Tr. 429). Petitioner then asked about the telephone call Mrs. Ott had made to him the previous Sunday and when he explained that he hoped to contradict the daughter's testimony the court let him proceed (R. 86-87; Tr. 430-431). The mother said she had not heard the conversation (R. 87; Tr. 431), at which point petitioner said (R. 88; Tr. 431-432):

⁹ A substantially similar incident occurred later in the trial (R. 223; Tr. 1123).

If Your Honor please, I object to this witness Ott—I call Your Honor's attention, she was nodding her head forward. Your Honor, that is the very reason I object to Mrs. Ott being in the front row, looking at the witness.

The prosecutor said that petitioner was trying to be sensational, and subsequently the following occurred (R. 88-89; Tr. 432-433):

The COURT: You are guilty of a serious breach of decorum. Please bear in mind the admonition I made at the bench.

Proceed.

Mr. OFFUT: May I have the question read and the answer, please, Your Honor?

The COURT: No. You ask the question again. You interrupted yourself, you know, by this commotion.

Mr. OFFUT: Your Honor, I object to that statement by the Court. I thought I was bringing something to the Court's attention.

The COURT: Yes, but you did it in an excitable manner and—

Mr. OFFUT (Interposing): It's enough to get excited.

The COURT (Continuing):—and in a boisterous manner.

Mr. OFFUT: I didn't mean to be boisterous.

The COURT: I assume that you didn't mean that, but that is no excuse for a breach of decorum. Proceed.

When the witness was asked if she brought the letters asked for in the subpoena, she said she had none to bring (R. 91; Tr. 436). Mrs. Hodges was asked whether she received any letter from Mrs. Ott stating that she had attempted to bring about a miscarriage on herself and the witness replied that she had not (R. 97; Tr. 445).

(4) *June 5 to June 16, 1952*

As the trial progressed, there continued to be a rapid increase in the number of incidents (e.g. R. 128-129, 130-131, 135-136, 137-138, 139-142, 154, 159, 159-160, 161-162, 167, 173-174, 179-180, 196-197, 198-200, 207-208, 210-211, 213-215, 217, 223, 226-227, 229-230, 242, 243-244, 245, 246, 253), in spite of persistent admonitions and reprimands. For instance, at the opening of court on June 5, there was a bench conference, at which the court denied petitioner's motion for a mistrial on the grounds that the newspapers had carried an account of petitioner's differences with the court, and denied his request to recall Mrs. Ott for further cross-examination (R. 123-127; Tr. 568-574). After petitioner returned to the counsel table, the judge began to talk to the court reporter, when petitioner again approached the bench and the following discussion occurred (R. 127; Tr. 574):

Mr. OFFUT: I didn't hear what was taking place. What was it?

The COURT: I think this is a conference between the Court and the reporter.

Mr. OFFUT: In connection with this case?

The COURT: No. It was a private conference between the reporter and the Court.

Mr. OFFUT: Was it in connection with this case?

The COURT: You are insolent in asking that. I said it was a private conference between the reporter and the Court.

As these incidents continued, the trial judge began to show signs of losing patience with petitioner. An extreme example is set out in full in the appendix to this brief (Gov. App. pp. 77-82, *infra*). This episode was provoked when petitioner persisted in arguing after the court had overruled one of his objections, and refused to return to his seat at the counsel table, though twice directed to do so by the court. The court a third time directed him to go back, this time coupled with the statement "Stop, or I will have the Marshal pull you back to your seat." At this point the petitioner resumed his seat and the following took place (R. 214-215; Tr. 1082):

Mr. OFFUT: If the Court please, I respectfully move Your Honor for a mistrial and—

The COURT: Motion denied.

Mr. OFFUT (Continuing):—and I want to put the proffer on the record at this time—

The COURT: Motion denied.

Mr. OFFUT: And I want the record to show that Your Honor raised your hand—

The COURT: Motion denied.

Mr. OFFUT: (Continuing)—and ordered me back from the bench.

The COURT: Motion denied. Proceed.

Mr. OFFUT: I object to Your Honor yelling at me and raising your voice like that.

The COURT: Just a moment. If you say another word I will have the Marshal stick a gag in your mouth.

You proceed with the examination of the witness. Proceed.

However, interspersed between such episodes, there were times when petitioner complied with customary standards of advocacy, developed relevant testimony, and refrained from provocative, disorderly and improper conduct. A reading of the liberal and full direct examination permitted petitioner when defendant Peckham was testifying in his own defense (Tr. 1228-1364) illustrates the complete absence of any showing of hostility towards petitioner on the part of the trial judge, even after such incidents of exasperation at petitioner as that described just above (pp. 23-24, *supra*), whenever petitioner met customary standards. A few examples of these periods of relative calm, are included in Appendix A to this brief (Gov. App., pp. 51-74, *infra*).

Further examples of petitioner's continued attempts to cause the disintegration of the *Peckham* trial and to provoke the judge into an episode which might require a mistrial, are to be found in Appendix B to this brief (Gov. App. 74-82, *infra*) and repeatedly throughout the entire trial transcript.

SUMMARY OF ARGUMENT

I

Petitioner's conduct, displayed time and time again throughout the *Peckham* trial and in the face of repeated warnings and admonitions, was insolent, obstructive, disorderly and openly contemptuous.

Consideration of the entire trial transcript makes clear beyond question the correctness of the Government's position that petitioner initially instigated and is primarily responsible for the altercations and incidents which marred the trial and which on occasion finally provoked the trial judge to sharp and hostile comments directed at such misbehavior. Petitioner's claim, that his whole course of conduct was an entirely proper response to "great provocation" (Br. 5) at the hands of a prejudiced judge, is not only wholly unsupported by the trial record but involves obvious distortion of the two opinions of the Court of Appeals (R. 264-267 and 269-290).

II

Petitioner cannot escape punishment at the hands of the trial judge for the repeated contempts committed in his presence in open court, merely because he succeeded in some degree in disturbing the judge's imperturbability and at times in provoking sharp retort from the bench. This is particularly so where, as here, any such hostility as may have been displayed was carefully limited to the misbehavior which provoked it. Otherwise, all a

contemnor need do, in order to escape summary punishment, would be to resort to conduct calculated to provoke the trial judge into making some unjudicial comment.

Nor can petitioner escape such punishment because of the reversal of the conviction of petitioner's client Peckham. This reversal was predicated, as the Court of Appeals explained (R. 283-284), upon the necessity of taking "scrupulous care" not to have the jury weigh petitioner's misconduct against his client, the court having failed to instruct the jury in this regard.

The record shows no basis for disqualifying the trial judge from exercising his power, under Rule 42(a) of the Federal Rules of Criminal Procedure, to punish petitioner summarily for his repeated disorderly contempts. There is no support for petitioner's contention, in the light of the entire trial record, that the trial judge was in any way incapable of fairly adjudicating whether petitioner was guilty of contempt. Such an adjudication can be properly exercised, as here, at the close of trial, and by a judge at whom some of petitioner's misconduct was directed, the procedure approved in *Sacher v. United States*, 343 U.S. 1.

Petitioner's contempt conviction was, therefore, a proper and appropriate exercise of the court's summary contempt power. Petitioner's modified sentence of forty-eight hours' confinement takes into account all possible mitigating factors, and constitutes a minimum penalty, considering the flagrant character of his repeated misconduct.

ARGUMENT

I

Petitioner Was Guilty of Gross Misconduct Involving Repeated Instances of Insolence, Obstructive Action, Disorderly Disregard of the Court's Rulings and Orders, and Other Improper Conduct.

The record in this case leaves no inkling of a doubt but that petitioner was, as the court below held, guilty of insolent and offensive conduct. And as in *Sacher v. United States*, 343 U.S. 1, 5, the findings herein are "not based on an isolated instance of hasty contumacious speech or behavior, but upon a course of conduct long-continued in the face of warnings that it was regarded by the court as contemptuous."

The record shows that the bulk of the incidents resulted from two general methods of attack which were followed by petitioner. *First*, through persistently insulting and belligerent conduct, continued repetition of irrelevant objections and exceptions and calculated disobedience of the court's rulings and orders, petitioner attempted, as found by the trial judge (R. 28), and affirmed by the Court of Appeals (R. 266), to provoke the trial judge into an incident which would necessitate the declaration of a mistrial. *Second*, contrary to the explicit and repeated orders of the trial court, petitioner attempted to, and more than frequently succeeded in, introducing evidence which was wholly irrelevant to any issue before the court, merely for the purpose of (a) confusing the jury as to the

guilt of the defendant Peckham, (b) besmirching and villifying the character and reputation of various witnesses, and (c) humiliating the prosecutrix, her mother, and friends¹⁹ in the eyes of the jury and the public.

We have set forth in the Statement (pp. 12-24, *supra*) only a few of the many instances of such misconduct. For example, it has been impossible to set forth the many times that petitioner deliberately disregarded the rulings of the court and proceeded to reiterate, in essentially the same form, a line of questioning that had been excluded (e.g. R. 85, 89-93, 119-121, 122-123, 129-130, 133-134, 144, 151-152, 157-158, 166-167, 172-174, 182, 196, 192-193, 198, 200, 219-222, 223-224, 225, 232-234, 235-236, 239-240). Such a continuous disregard of the rulings of the court cannot possibly be justified as necessary to protect the interests of petitioner's client. The court meticulously permitted petitioner to note the objections which he wished to make (e.g. R. 90, 119, 125, 175, 182, 221, 238). The vice here, just as in *Hallinan v. United States*, 182 F. 2d 880, 887 (C.A. 9), certiorari denied, 341 U. S. 952, was not petitioner's desire to get his evidence before the court or to make a record thereof for appeal, "but the manner in which it was attempted to be accomplished." As in the *Hallinan* case,

¹⁹ The complete direct examination of Lieutenant Donahower, an Air Force officer, is a particularly striking example of this particular type of abuse (R. 200-204; cf. R. 204-206, 47-49). Not a single relevant question was asked of this witness, who had been held under subpoena for several days.

supra, at 887, it is clear that petitioner "went far beyond the necessity of making a record and that his conduct shows a deliberate and studied design to ignore the rulings of the Court in order to get before the jury the excluded matter."¹¹

Similarly, petitioner's repeated rude and discourteous remarks cannot be justified, as he now attempts (Br. 25), on the theory that he merely sought, in compliance with the rulings in *Butler v. United States*, 188 F. 2d 24 (C.A. D.C.), *Billeci v. United States*, 184 F. 2d 394 (C.A. D.C.), and *Vinci v. United States*, 159 F. 2d 777 (C.A. D.C.), to have the record reflect the judge's personal mannerisms, which he deemed prejudicial to his client. Petitioner failed to comply with the fundamental requirement announced in those cases that objections for the record to the intonations and gestures of the trial judge must be made out of the jury's hearing. On at least sixteen occasions in the jury's presence, petitioner was insolently and openly critical of the trial judge's personal mannerisms (R. 81, 130-131, 154, 161-162, 173-174, 196-197, 210, 214-215, 223, 226, 231, ~~240~~, 250-251, 253 and Tr. 1098, 1341 and 1460). In none of these instances did petitioner request a bench conference

¹¹ *Caldwell v. United States*, 28 F. 2d 684 (C.A. 9), which petitioner cites (Br. 25), is not in conflict with the *Hallinan* case. In the *Caldwell* case, the court held that an isolated instance of repetition, by an attorney, of an excluded question, without any evidence of intent to evade the court's ruling, did not constitute contempt of court. In that case, there was no relentless effort, as in the present case, to bring excluded matters to the knowledge of the jury.

for the purpose of making or considering an objection of this type, although he frequently requested such conferences for other specified purposes.¹² The record as a whole conveys the convincing conclusion that petitioner was deliberately and insolently trying to use the rule of the above-cited cases as a method of baiting the trial judge and creating disorder at the trial.

The record does not support petitioner's contention that he was goaded into his conduct by the court. A reading of the transcript makes it perfectly clear that, to whatever extent the trial judge may have exceeded the strict limits of judicial imperturbability, each instance was provoked by petitioner. The excerpts cited by the Court of Appeals in the appendix to the *Peckham* decision (R. 285-290) cannot fairly be judged alone, but must, as that court recognized (R. 266), be considered in the light of petitioner's provokingly insolent conduct and his continuous deliberate attempts to inject all sorts of extraneous issues into the case. No trial judge could have properly conducted the trial in the face of petitioner's tactics without in-

¹² Many of petitioner's requests for bench conferences were granted (e.g. R. 145-146, 163, 177-180, 185-186), although a number of such requests were refused, when the reasons given appeared to be without merit (e.g. R. 136, 156, 218). It is significant that on no occasion when a bench conference request was either granted or refused did petitioner indicate that he wished to record a so-called *Billeci* type objection. Occasionally such objections were noted during bench conferences which had been requested for other purposes (e.g. R. 179-180).

jecting himself into the case to some extent, if examination and cross-examination were to be kept anywhere within reasonable limits of relevancy.

The Court will find, on a reading of the transcript, that most of the altercations between the trial court and petitioner arose when petitioner attempted to go far beyond the limits of propriety, particularly in his attempts to try the complaining witness rather than defendant Peckham. The trial court was well aware that the credibility of Mrs. Ott was an important issue in the case and a reading of her two hundred page cross-examination (Tr. 155-183, 185-217, 227-323, 334-367, 373-392) shows that petitioner was allowed great leeway in examining her. But, manifestly, the court could not properly allow to pass unchallenged a question like "When were you arrested" (R. 50) especially since petitioner surely knew that she had not been arrested at all.

The examination of Mrs. Hodges, the mother of Mrs. Ott, is a good example of the problem which petitioner's tactics presented to a trial court. The whole examination (Tr. 418-448) is so full of irrelevancies that it is hard to believe that petitioner called the witness in good faith. Certainly there was nothing in the judge's conduct in excluding several irrelevant questions (R. 78-79) to justify petitioner's outburst to the effect that, if he were going to be interrupted, he did not want to examine the witness (R. 79). Petitioner's tirade had absolutely no relationship to the correctness of the court's ruling at that moment.

On the whole record, it is difficult to escape the conclusion that petitioner deliberately tried to create an incident whenever he was in any way curtailed in his attempts to inject into the record prejudicial irrelevancies involving the details of Mrs. Ott's private life.¹³

II

The Trial Judge Properly Held Petitioner Guilty of Contempt Committed in His Presence in Open Court

A. *The record shows no basis for disqualifying the trial judge from adjudicating petitioner's contempt, since any hostility displayed by the court was directly provoked by petitioner's own repeated misconduct and was carefully limited to such misbehavior.*

Petitioner argues that the reversal by the Court of Appeals of the conviction in the *Peckham* case necessarily establishes that the trial court was too biased to be able properly to adjudicate him in contempt. The Court of Appeals obviously did not consider its *Peckham* decision as so holding since

¹³ Petitioner's contention (Br. 27) that the findings under the specifications affirmed by the court below are void, because they do not include any finding that his misconduct was committed wilfully or in bad faith, is without substance. The certificate of contempt (R. 25-29) leaves no doubt that the trial court found petitioner guilty of deliberate and wilful misconduct in the court's presence. It states that the trial court found that petitioner was "insolent", "insulting" and "discourteous." These terms can be read only in terms of wilfulness. The certificate further states that petitioner "persisted in repeating questions", many of which "were obviously intended to besmirch a witness", and that he "tried to create an episode that

the same three judges affirmed petitioner's conviction for contempt. As that court explained in its *Peckham* opinion (R. 283-284):

We are all agreed that the misconduct of appellant's counsel [petitioner] which helped produce such atmosphere is for the contempt proceedings against counsel, and scrupulous care must be taken not to weigh such misconduct against appellant.

There is no basis in the record for reaching the conclusion that the trial judge demonstrated any bias against petitioner other than a strong dislike of his contumacious conduct.

Similarly, there is no basis in the record for concluding that the trial court had any bias or lack of impartiality towards petitioner's client. Petitioner's statement (Br. 12) that the Court of Appeals "affirmatively found" that the trial judge showed hostility, bias and a lack of impartiality against petitioner's *client* is wholly without support. As

might lead the court to direct a mistrial." These phrases necessarily imply that petitioner's misconduct was intentional, deliberate and wilful.

In any event, the conduct thus described was contemptuous *per se* and required no words of explanation or elaboration. *MacInnis v. United States*, 191 F. 2d 157 (C.A. 9), certiorari denied, 342 U.S. 953; *United States v. Bollenbach*, 125 F. 2d 458 (C.A. 2); see *Berkon v. Mahoney*, 268 App. Div. 825, 49 N.Y.S. 2d 551 (1944), affirmed without opinion, 294 N.Y. 828, 62 N.E. 2d 388 (1945). Contempt is usually determined by the nature of the act done. When the circumstances are such that no inference save that of his wilful contumacy is reasonably possible, the contemnor will not be allowed to quibble about the precise state of mind and feelings. See *Wartman v. Wartman*, 29 Fed. Cas. No. 17,210 (C.C. D. Md.).

that court's opinion makes clear, Peckham's conviction was reversed on a divided vote solely because two of the three judges, in taking "scrupulous care" not to have the jury weigh petitioner's misconduct against his client, concluded "in the light of the disorderly atmosphere of the trial, it would require too great a degree of speculation to say that [Peckham] was fairly tried" (R. 283-284).

Petitioner (Br. 14) attempts further to magnify out of all proportion the language of the *Peckham* opinion by confusing the court's statement of Peckham's arguments with its actual holding. In describing Peckham's contentions, that court stated (R. 281):

A number of other questions are presented generally. These include claims of degrading and belittling remarks directed at defense counsel by the judge, restrictions upon cross-examination, the judge's assumption of the function of an advocate, lack of impartiality,¹⁴ and prejudicial remarks by the prosecutor.

In ruling on these particular claims, the court said (R. 281-282):

As to the effect of these matters on the fundamental fairness of the trial this court finds itself divided. Judge Edgerton and Judge Bazelon, constituting a majority of the court,

¹⁴ [Footnote by court:] "The statement of the court to the jury, after they had returned their verdict, indicating his strong feelings as to the guilt of defendant does not show error in the conduct of the trial itself."

are convinced that the excessive injection of the trial judge into the examination of witnesses, his numerous comments to defense counsel, indicating *at times* hostility, *though under provocation*, demonstrated a bias and lack of impartiality which *may* well have influenced the jury;¹⁵ that, considering these matters and others,¹⁶ examples of which are set forth in an Appendix attached hereto, this court is barred from sustaining the judgment as the product of a fair and impartial trial. This necessitates reversal. [Emphasis added.]

Judge Fahy, the third member of the court, dissented on the ground that the distinction drawn by the jury, in convicting Peckham on the one count which was very strongly supported by the evidence and acquitting him on the other which was less well corroborated, "indicate[d] an impartial consideration of the evidence" (R. 283). He further noted (R. 283):

¹⁵ [Footnote by court:] "Throughout the fourteen day trial there were numerous clashes between defense counsel, on the one hand, and court and prosecutor, on the other. Although defense counsel never requested the court to admonish the jury that these unfortunate incidents were not to be taken against appellant, the majority believes that minimal precautions required such admonition either at the time they occurred or in the charge to the jury. See, for example, *United States v. Dennis*, 183 F. 2d, 201, 225 (2d Cir.), *affirmed*, 341 U. S. 494; and *Mansfield v. United States*, 76 F. 2d 224, 232 (8th Cir.), *cert. denied*, 296 U. S. 601, where such instructions were given."

¹⁶ [Footnote by court:] "Including some of those which we have previously discussed and which the majority concede would not, standing alone, amount to prejudicial error."

* * * the defense was fully presented from an evidentiary standpoint, there was full enough cross-examination of all Government witnesses, the relevant aspects of their characters and lives, as of all other witnesses, were brought to light before the jury, and the jury were adequately instructed.

That petitioner at times provoked the judge into sharp comment certainly does not excuse petitioner's contempt. Otherwise, all a contemnor need do, in order to escape summary punishment, is to resort to conduct calculated inevitably to provoke the trial judge into making some unjudicial remarks or comment. In *Fisher v. Pace*, 336 U. S. 155, 162-163, this Court, although recognizing that "[t]he conduct of a judge should be such as to command respect for himself as well as for his office", held: "We cannot say, however, that mildly provocative language from the bench puts a constitutional protection around an attorney so as to allow him to show contempt for judge and court".¹⁷ In this case there was no intent whatsoever on the judge's part to provoke petitioner. There was merely at times, under petitioner's provocation,

¹⁷ In cases in other jurisdictions, although the question of the trial judges' disqualification on grounds of their provocation of the contemnors was not, just as in the *Fisher* case, directly involved, the courts have held the provocations to be merely a possible mitigating circumstance warranting only modification of the sentences imposed. See *Rothbard v. Brennan*, 263 App. Div. 991, 33 N.Y.S. 2d 361 (1942); *Pugh v. Winter*, 253 App. Div. 295, 2 N.Y.S. 2d 9 (1938); *Deskens v. State*, 62 Okla. Crim. 314, 71 P. 2d 502 (1937); see also *United States v. Markeywich*, 261 Fed. 537 (S.D. N.Y.).

a loss of calm which unfortunately seems only to have incited petitioner to further impertinent retorts. Certainly such of the judge's comments as might possibly have aggravated petitioner were, when considered in the light of petitioner's conduct, less provocative than the judge's remarks which led up to the single instance of contempt in the *Fisher* case.¹⁸ In fact, in the latter case, the trial judge initiated the provocation, which led to the contemptuous acts. In the instant case, the trial judge's judicial restraint gave way only after he himself had been provoked by a prolonged series of contemptuous acts by petitioner.

At the most, any provocation to which petitioner might have responded resulted from what the court below called the trial judge's "excessive injection * * * into the examination of witnesses, [and] his numerous comments to defense counsel, indicating at times hostility, though under provocation" (R. 281). This could have related only to the portion of petitioner's conduct described in the first specification of the judge's certificate, i.e., petitioner's "insolent, insulting and offensive

¹⁸ Facts *dehors* the record in the *Fisher* case showed grounds warranting a strong inference of bias on part of the trial judge. The counsel held in contempt was running against the judge, who was seeking reelection. See *Comment*, 34 Iowa L. Rev. 673, 676 (1949); *Beaumont Enterprise*, Feb. 8, 1949, p. 1, col. 6. Also the counsel opposing the contemnor at the trial was the trial judge's son. See *Comment*, 34 Iowa L. Rev. 673, 676 (1949); Petitioner's Brief in No. 45, Sup. Ct. Oct. Term 1948. The contempt involved in that case occurred during a trial in a state court of Texas, where the relationship of judge to opposing counsel is not disqualifying. *Postal Mutual Indem. Co. v. Ellis*, 140 Tex. 570, 169 S.W. 2d 482 (1943).

remarks" and "gross discourtesy to the court" (R. 26). The judge's conduct could have had no relation to that part of petitioner's misconduct described in the remaining three specifications upheld by the court below, namely, that petitioner "persisted in repeating questions," many of which were "intended to besmirch a witness" and though "previously excluded by the court," were made "in order to evade the court's rulings, in spite of admonitions by the court to the contrary"; that "[o]n several occasions he asked of witnesses questions that were highly prejudicial to the witness and for which there was no foundation"; and that "[h]e constantly tried to create an episode that might lead the court to direct a mistrial" (R. 26-28). Thus, many aspects of petitioner's misconduct cannot be attributed to any possible aggravation at the hands of the trial judge.

There were occasions, late in the *Peckham* trial, after he had been subjected to the constant pressure of petitioner's disgraceful conduct, when the trial judge expressed himself with more sharpness than might have been hoped for, but, as hitherto emphasized, individual displays of temper by either court or counsel cannot fairly be judged except in the context of the entire record. Fairly read as a whole, the record clearly establishes that provocation, both initially and in the main, came from petitioner, and not the judge.

Furthermore, a holding that frequent altercations between court and counsel, unaccompanied by any admonition to the jury not to take such incidents against petitioner's client (R. 281-282 fn.

14), created too disorderly an atmosphere to be sure that the client received a fair trial, does not establish that the court was unable to judge fairly whether counsel had embarked on a deliberate and wholly unjustified course of contumacious conduct.

The type of hostility which the trial judge was provoked into displaying by petitioner's repeatedly insolent, disorderly and obstructive misconduct, appears to have been no greater than that displayed from the bench, under somewhat similar provocation, during the trial in *Dennis v. United States*, 341 U. S. 494. See appendix to dissenting opinion of Frankfurter, J., in *Sacher v. United States*, 343 U. S. 1, 42-89. Such provoked hostility was held by this Court, in the *Sacher* case, not to disqualify the trial judge from taking summary action, at the close of the trial, to punish counsel for their repeated contempts.

In the *Dennis* case, no reversal of the defendants' conviction was required, by reason of the trial court's displays of provoked hostility toward counsel, because, as held by the Second Circuit, "Throughout, the judge kept repeating to the jury that they were not to take what he said to the attorneys against their clients." *United States v. Dennis*, 183 F. 2d 201, 225, affirmed without consideration of this point, 341 U. S. 494. In *Peckham*, however, no such admonitions were made by the trial judge. As the court below noted in its *Peckham* opinion (R. 282):

Although defense counsel never requested the court to admonish the jury that these unfor-

fortunate incidents were not to be taken against appellant, the majority believes that minimal precautions required such admonition either at the time they occurred or in the charge to the jury.

The trial court's failure in this regard explains why the Court of Appeals reversed Peckham's conviction, but nevertheless affirmed the summary contempt holding against petitioner, after taking into consideration every possible mitigating factor and reducing his confinement sentence from ten days to forty-eight hours.

The record in this case shows that the trial judge never let his annoyance at petitioner's disgraceful conduct influence his judgment on legal matters. Time after time, the judge, after reprimanding petitioner for a breach of decorum, ruled in petitioner's favor, when he offered a sound legal position. Thus, in the cross-examination of Mary Ott, after the court had ruled that it would exclude questions designed to elicit from her what Christenson had said and petitioner still continued to ask questions along such line (R. 54-55), the court ruled that a question as to when the witness had last seen Christenson was proper (R. 54). On numerous other occasions during her cross-examination, the court overruled objections by the prosecution (e.g. Tr. 194, 200, 208, 210, 211, 215, 278, 302, 303, 308, 309-311, 330, 373). After petitioner's outburst during the testimony of Mrs. Hodges (R. 79), the court overruled several objections by the

prosecutor to questions asked by petitioner (R. 80-81). The discussion at the bench as to what use could be made of the medical records in fairness to defendant without violating the witness's privilege (R. 113) shows how the judge endeavored to be completely fair when faced with what he regarded as a genuine legal problem.

Despite all the various incidents that occurred during the presentation of the government's case, the discussion on petitioner's motions, both at the close of the government's case and at the close of all the testimony, shows that the judge was calm and reasonable whenever petitioner behaved in a proper manner (Tr. 817-823, 1700-1726). The court showed great leniency in permitting examination of a witness who had made a telephone call to Mrs. Ott for Christenson while Christenson was in jail, stating that he would not curtail the examination although he could not see the materiality (Tr. 882). On another occasion, the court undertook to explain to the prosecutor the possible relevancy of petitioner's questions (Tr. 903). The court's most direct evidence of annoyance with petitioner occurred on June 10, after petitioner had made a formal motion for a mistrial and continued to argue with the judge after he had made his rulings (R. 207-208, 210-211, 213-215). But thereafter the court displayed considerable patience during examination by petitioner of the prosecuting attorney for the government (Tr. 1163-1179) and one of his own associates (Tr. 1180-1205), a species of trial tactics which might well try the patience of the most pa-

tient judge. The reading of the testimony at this point sufficiently negates the argument that the judge was trying unduly to speed up the proceeding, unless any limitation on endless repetitiousness and irrelevancies is deemed an improper or unjustified effort to keep a case within reasonable bounds.

In short, while petitioner succeeded in goading the trial judge into some sharp statements, the record clearly shows that whenever petitioner behaved, the judge acted in a judicial, proper and unbiased manner.

There is no evidence that the trial judge, in punishing petitioner, did so in an unthinking moment of personal pique, or for any other reason than in the interests of improving public respect for the courts by insisting on the maintenance of proper standards on the part of the bar. Early in the trial, when petitioner's discourtesies began to gain frequency, and long before there were signs of disturbance in the trial judge's judicial temper, the judge warned petitioner that if the conduct persisted he would send petitioner to jail at the end of the trial (R. 81, 88). Such warnings were repeated on several occasions during the trial (R. 142, 180). That petitioner, by failing to heed the judge's warnings to desist from his contemptuous conduct, finally succeeded in dislodging the trial judge's composure at times later in the trial does not show that, after the moment of pique had passed, the judge was incapable of acting fairly. On the contrary, the record conclusively estab-

lishes that the judge did not carry over his momentary annoyances.¹⁹

B. *The trial judge did not lose his power to punish petitioner summarily for contempt by deferring his action until the close of the trial, or because some of petitioner's misconduct was directed towards the judge as an individual.*

Even assuming, as the Court of Appeals states, that petitioner's "conduct cannot fairly be considered apart from that of the trial judge" each having "responded to great provocation from the other," still, there is no basis for disturbing the judgment below. For this Court's recent decision in *Sacher v. United States*, 343 U. S. 1, is dispositive of the issue thus presented. That case holds first that a district judge may, as here, postpone to the end of the trial the imposition of summary punishment on lawyers whose contempts have pervaded the trial, thus permitting an adjudication at a time when a far greater degree of calm and judg-

¹⁹ The sentence of ten days' imprisonment imposed by the trial judge does not show bias in view of the flagrant character of petitioner's repeated contempts. The court below reduced it to 48 hours' imprisonment only because of the mitigating circumstances of the trial judge's provoked sharp admonitions. It is generally held that in contempt proceedings the courts should exercise only "the least possible power adequate to the end proposed." *Anderson v. Dunn*, 6 Wheat. 204, 231; see *In re Michael*, 326 U.S. 224, 227; cf. *United States v. United Mine Workers of America*, 330 U.S. 258, 304. Provocation is a factor to be considered in determining adequate punishment. *Rothbard v. Brennan*, 263 App. Div. 991, 33 N.Y.S. 2d 361 (1942); *Pugh v. Winter*, 253 App. Div. 295, 2 N.Y.S. 2d 9 (1938); cf. *United States v. Markevich*, 261 Fed. 537 (S.D. N.Y.); *Deskins v. State*, 62 Okla. Crim. 314, 71 P. 2d 502 (1937).

ment can be expected than at the moment the contempt occurred. It also holds that the judge is not deprived of this power by reason of some of the contempts being directed at him personally. The language of the Court on this issue is explicit (343 U. S. at pp. 11-12) :

A construction of the Rule is advocated which would deny a judge power summarily to punish a contempt that is personal to himself except, perhaps, at a moment when it is necessary to forestall abortion of the trial. His only recourse, it is said, is to become an accuser or complaining witness in a proceeding before another judge.

The Rule itself expresses no such limitation, and the contrary inference is almost inescapable. It is almost inevitable that any contempt of a court committed in the presence of a judge during a trial will be an offense against his dignity and authority. At a trial the court is so much the judge and the judge so much the court that the two terms are used interchangeably in countless opinions in this Court and generally in the literature of the law, and contempt of the one is contempt of the other. *It cannot be that summary punishment is only for such minor contempts as leave the judge indifferent and may be evaded by adding hectoring, abusive and defiant conduct toward the judge as an individual. Such an interpretation would nullify, in practice, the power it purports to grant.* [Emphasis added.]

Sacher, in short, squarely recognizes the principle which is decisive here: merely because the trial judge has become provoked by a lawyer's improper conduct, the former is not deprived of the power to hold the latter guilty of contempt. This is so at least in the absence of a showing that the contempt conviction was unreasonably or arbitrarily imposed by a judge who had wholly incapacitated himself from acting judicially, which is not true either of *Sacher* or the present case.

Since the record does not show any bias on the part of the trial judge which would disqualify him from enforcing the dignity of the court against petitioner's deliberately contumacious conduct, the judge's power to act at the close of the trial under Rule 42 (a), F. R. Crim. P., is clearly established. As this Court stated in *Sacher* (at p. 9), the practical reason for vesting the judges with power to punish summarily direct contempts is that "the formality, delay and digression that * * * result from the issuance of process, service of complaint and answer, holding hearings, taking evidence, listening to arguments, awaiting briefs, submission of findings, and all that goes with a conventional court trial", frustrate the immediate purpose of the punishment for contempt in the face of court. And (at p. 8) "the very practical reasons which have led every system of law to vest a contempt power in one who presides over judicial proceedings also are the reasons which account for it being made summary."

Indeed, to require such repeated contempts to be tried before another judge, with the original judge merely one of the witnesses as to what occurred, would not only tend to impair judicial dignity but, more importantly, would deprive a judge's orders of much of their effectiveness. For, obviously, his authority would be lessened if proof of disrespect for the court depended upon the taking of testimony of the judge, interested parties, and other persons in the courtroom, as to whether an attorney had shouted, sneered or emphasized some particular words in an insulting fashion.

Even so, it may be appropriate in an excess of caution so as to prevent some possible future injustice or abuse, to place some limits on the power of a federal judge to punish summarily for contempt in certain instances. Such a limitation might perhaps be warranted in cases where the toneless record fails to show any improper act on the part of counsel and sole "[r]eliance must be placed upon the fairness and objectivity of the presiding judge" (cf. *Fisher v. Pace*, 336 U. S. 155, 161), or where a grossly excessive or disproportionate sentence is imposed. However, clearly no such limitation is in any way justified or appropriate in the present case, where "[t]he record amply supports" (R. 266) a finding of repeated disorderly contempts, and, furthermore, fails to disclose any disqualifying incapacity on the part of the trial judge. Another factor which lends support to the decision of the court below is the

total absence here of any of the political pressures or the type of emotional atmosphere involved in *Sacher*.

The object of proceedings for criminal contempt is to assure orderly procedure in the courts and to prevent the administration of justice from falling into disrepute, and not to vindicate the personal feelings of any individual. See *Parker v. United States*, 153 F. 2d 66, 70 (C.A. 1); *Leitstein v. Capital Co.*, 96 F. 2d 23, 25 (C.A. 3);²⁰ see also Phillips and McCoy, *Conduct of Judges and Lawyers* (1952), at 86. In sentencing petitioner, the trial judge was merely carrying out his trust of vindicating the dignity and the authority of the court. *Ex parte Hudgings*, 249 U.S. 378; *Ex parte Terry*, 128 U.S. 289; cf. *Cooke v. United States*, 267 U.S. 517.

Punishment for contempt is disciplinary. "[I]ts great and only purpose is to secure judicial authority from obstruction in the performance of its duties * * *". *Ex parte Hudgings*, 249 U. S. 378, 383. The power to act summarily is founded upon the same pragmatic sanction—the preservation of the public order—which makes it necessary to

²⁰ Years ago a distinguished English jurist stated that, except for a judge's duty to vindicate the dignity of the court, "there would be scarcely a case, I think, in which any Judge would consider that, as far as his personal dignity goes, it would be worth while to take any steps". Blackburn, J., *Skipworth's Case*, (1873) L.R. 9 Q.B. Ca. 230, 232; see also *Ex parte Fernandez*, (1861) 10 C.B. (N.S.) 3.

grant summary powers to other persons who must enforce discipline, such as army commanders in the field, masters of ships at sea, and traffic policemen. Experience has shown that discipline cannot be effectively maintained unless the person with authority to maintain it has, and on occasion exercises, the authority to enforce it. Petitioner was here punished summarily in order to demonstrate that repeated disorderly conduct in the court room would not be tolerated. Cf. *Ex parte Terry*, 128 U.S. 289.

Part of the popular dissatisfaction with the administration of justice stems from the too frequent instances when trial counsel forget that they are officers of the court, and engage in "the bullying of witnesses" and other sensational and improper conduct, coupled with the failure of trial courts to exercise any adequate restraint on the use of such tactics. See Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, Report of the 29th Annual Meeting of the American Bar Association (1906), 395, 405-406. As Dean Pound states:

The effect of our exaggerated contentious procedure is not only to irritate parties, witnesses and jurors in particular cases, but to give to the whole community a false notion of the purpose and end of law.

While courts must be especially careful not to curtail in any way the legitimate functions of trial counsel, they must be permitted to mete out prompt

and effective discipline in cases involving repeated obstructive and contemptuous tactics, of the kind here perpetrated by petitioner, which have done so much to bring the courts and the Bar of this country into disrepute. Cf. Phillips & McCoy, *Conduct of Judges and Lawyers* (1952), at 79-81, 86-87.

Instances of such deliberate, prolonged, flagrant insolence as are shown by this record are fortunately very rare, but rare as they may be, such conduct must be subject to quick and effective control if the effectiveness and dignity of court proceedings is to be maintained. Whether another judge, in the face of petitioner's conduct, might have shown greater or less patience is not the issue here. The fact remains that petitioner was guilty of gross misbehavior in the presence of the court, as "[t]he record amply supports" (R. 266), and that there is nothing in the conduct of the trial judge which shows that he was incapable of dealing with it fairly.

The Court of Appeals, in reducing petitioner's sentence from ten days of confinement to forty-eight hours, took into consideration every possible mitigating factor. This modified sentence constitutes a minimum penalty, considering the flagrant character of petitioner's repeated misconduct, and is clearly appropriate and proper.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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SEPTEMBER 1954.

GOVERNMENT APPENDIX A

EXAMPLES TYPIFYING THE LATITUDE ALLOWED PETITIONER AND THE ABSENCE OF HOSTILITY TO HIM WHENEVER HE COMPLIED WITH CUSTOMARY STANDARDS.

(1) *May 29, 1952*

Mr. McLaughlin, the Government prosecutor, conducted the direct examination of Mrs. Ott, a principal Government witness, who was testifying as to the first abortion performed on her by the defendant Peckham. Mr. McLaughlin asked (Tr. 91-94):

Q. And did you pass the foetus?

A. Yes.

Mr. OFFUT: I object to this witness talking about passing the foetus. I don't know whether she is qualified to know what a foetus is or not.

Mr. McLAUGHLIN: All right; I will ask her.

The COURT: I am inclined to sustain the objection.

Mr. McLAUGHLIN: I will ask her now.

Mr. OFFUT: If Your Honor please, I have not objected to the line of questioning—

The COURT: I will sustain the objection.

Mr. McLAUGHLIN: Surely; I will ask her.

Mr. OFFUT: May we approach the bench a moment?

The COURT: No; there is nothing before the Court.

Mr. OFFUTT: There is something I want to ask Your Honor, so I won't have to interrupt.

The COURT: Very well, you may approach the bench.

(Thereupon counsel approached the bench and conferred with the Court, in a low tone of voice, as follows:)

The COURT: I sustained the objection because I think only the doctor can tell whether that was a foetus, or something else.

Mr. OFFUTT: Yes, Your Honor. I haven't objected to any of this. May my objection run to her description about her condition, subject to—I take it he is going to connect it up later with medical testimony.

The COURT: She can describe what she saw and what was done to her and how she felt. [Cf. Tr. 1918]

Mr. OFFUTT: I have no objection to that.

Then there is one other thing—so that I won't have to object—I take it he is going to fix a date later on?

The COURT: Well, I don't know.

Mr. McLAUGHLIN: I will set that.

Mr. OFFUTT: He did not fix the date; he said, early in May.

The COURT: That is sufficient.

Mr. McLAUGHLIN: I will set that, Your Honor.

Mr. OFFUTT: I just wanted to make that point.

The COURT: The indictment charges on or about May second.

Mr. McLAUGHLIN: I will set it specifically.

Mr. OFFUT: May I, so that I will protect my point, object to any evidence of an abortion, unless they prove that the child was viable?

There is a case in the Court of Appeals that the child must be viable; and if Your Honor wishes some points later, I shall be glad to present them.

The COURT: I will be glad to have that case; I do not recall it.

Mr. OFFUT: It is in 53 Appeals.

Mr. McLAUGHLIN: Our statute is broad enough even to cover an attempt to perform it.

The COURT: That is right.

Mr. OFFUT: That is right; but they must charge it.

The COURT: I shall be very glad to have you submit a citation on that.

Is it your contention that, in order to come within this statute, there must have been a viable foetus?

Mr. OFFUT: Yes, Your Honor.

The COURT: I am inclined to the opposite view, but if you have any authority to sustain your view, please submit it.

Mr. OFFUT: All right, Your Honor. Thank you.

(Thereupon counsel resumed their places at the trial table and the following proceedings were had in open court:)

By Mr. McLAUGHLIN:

Q. Miss Ott, you used the term "foetus."

A. Yes, sir.

Q. What did you mean by that?

A. By the foetus, I mean the embryo child, the baby.

Q. And you referred to the foetus, or the child. Was the child formed?

A. Yes, sir. May I describe it?

Q. Yes.

Q. Well, George was with me at the time, and we could see, first, the tiny feet come out—

Mr. OFFUT: I object to what George saw, and move that it be stricken.

The COURT: Yes; limit yourself to what you saw.

When the trial recessed over the Memorial Day week-end, the following occurred (Tr. 123-124):

The COURT: Ladies and gentlemen of the jury, you will be excused at this time until Monday morning at 10:30. Please be back in your seats a few minutes before 10:30 on Monday morning.

Over the week-end please do not discuss the case with anyone and do not read any newspaper articles concerning it, if there should be any notices in the press.

Mr. OFFUT: May I ask one other thing?

The COURT: Yes, indeed.

Mr. OFFUT: May I ask if Your Honor would ask the jury that if anyone talks about this case, in their presence, and they overhear it, will they let the Court know about it?

The COURT: Yes.

Do not let anyone talk about this case to you. If anyone does, or if you overhear anyone discussing this case, please report the matter to the Court.

Mr. McLAUGHLIN: I would suggest, also, for them to try to get the name of the person.

The COURT: Yes. If anyone tries to talk to you about this case, get that person's name and give it to the Court on Monday, or if you overhear anyone discussing the case will you report the matter.

Mr. OFFUT: May we approach the bench before you discharge the jury?

The COURT: Yes. The jury may be excused at this time until 10:30 Monday morning.

Mr. OFFUT: I said before you discharged the jury, Your Honor.

The COURT: Just a moment. Let the jury remain.

(Thereupon, counsel approached the bench and conferred with the Court, in a low tone of voice, as follows:)

Mr. OFFUT: Your Honor, I heard one of the men in the courtroom, I don't know who he

is, I could point him out, that when this jury was being impaneled—I just got this—that the lady who was on the stand just now was sitting in back and somebody who was on the jury asked her what the case was all about.

I would like to know, if Your Honor please, who that juror is. I don't know. That is the complaining witness on the stand now.

The COURT: How do you know the name of the juror?

Mr. OFFUTT: Only that this man says; he is a man that sticks around the court. Would Your Honor inquire?

The COURT: I would be glad to inquire Monday morning.

(2) *June 2, 1952*

Even when petitioner made no immediate objection, the trial judge of his own motion was careful to prevent the interjection by the prosecution of improper and prejudicial testimony (Tr. 150-151).

By Mr. McLAUGHLIN:

Q. Do you recall anything else, Miss Ott, that was said at that time about your being a witness?

A. Yes; I do. He asked me if I was really the complainant, or did someone else start this case, and wasn't I being forced to testify, and didn't I know what would happen if I did—didn't I know what happened in the previous cases? Then he told me about a case—

The COURT: No; just a moment. Will counsel come to the bench?

(Thereupon counsel approached the bench and conferred with the Court, in a low tone of voice, as follows:)

The COURT: I think all reference to previous cases should be kept out.

Mr. McLAUGHLIN: That is why I said to Your Honor previously, that she was going to say that in the previous case the girl was brought in on a stretcher.

The COURT: A case against this defendant?

Mr. McLAUGHLIN: Yes.

The COURT: Then I don't want any reference made to a previous case.

(3) June 2 and 3, 1952

Petitioner was allowed an extremely thorough cross-examination of Mrs. Ott, which began during the morning session on June 2 and lasted until late in the afternoon of June 3. It covers over 200 pages in the transcript (Tr. 155-183, 185-217, 227-323, 334-367, 373-392). The following excerpts illustrate both the wide scope of the cross-examination allowed petitioner, and the favorable treatment given to reasonable requests made by petitioner:

By Mr. OFFUTT:

Q. Didn't you live there with a man, whether it was Jones, or anybody, now, and hold him out to be your husband, at 3009 Q

Street, Northwest, to Mr. and Mrs. Steerman?

A. I never actually lived there with a man; no.

Q. You never stayed overnight with any man, and held him out to be your husband, to Mr. and Mrs. Steerman; is that your answer?

MR. McLAUGHLIN: I think this is repetitious.

THE COURT: Yes; I think we have been over that, before.

MR. OFFUTT: No; it is a different man—any man. I asked about Jones, specifically.

THE COURT: Very well; I will allow the question. Just answer Yes or No. (Tr. 166).

* * *

AFTERNOON SESSION

(Met, pursuant to the taking of the recess, at 1:45 o'clock p. m.)

THE COURT: Will counsel come to the bench.

(Thereupon counsel approached the bench and conferred with the Court, in a low tone of voice, as follows:)

THE COURT: You made a request, which I think was entirely reasonable, and that is that you have an opportunity to go to the Bar Outing; and in view of your request, I thought, if it was agreeable all around, we might recess

around two-thirty, or so. Is that agreeable to the Government?

Mr. McLAUGHLIN: I am not going to the outing, I know; I didn't anticipate it. But whatever Your Honor does is agreeable.

The COURT: I will recess around two-thirty. (Tr. 184.)

* * *

Q. Coming down for a moment, coming to this Sunday, yesterday, isn't this the conversation that took place yesterday, when you called me—the whole conversation——

Mr. McLAUGHLIN: I object to the phrasing of it. I think he ought to ask her questions. In other words, he is testifying in his question.

The COURT: This is cross-examination, and he is permitted to ask leading questions on cross-examination.

Mr. McLAUGHLIN: But he is testifying in his question,—“Didn't you say—” and then he reads a long question.

The COURT: He has the right to ask the question in that manner. (Tr. 193-194.)

* * *

Q. You are angry with the doctor, aren't you?

A. No sir; I am not angry with the doctor.

Q. Didn't you say you were, to me, on the telephone?

Mr. McLAUGHLIN: I suggest that she has answered that.

The COURT: No; this is proper cross-examination. (Tr. 208.)

* * *

Q. And didn't I say, in answer to that, this:—and you say the next thing.—

“In my investigation I am going to tell the truth and bring out the truth at all times; it's about time that the truth be exposed in this case; it's about time you begin to tell the truth. Who is listening to this conversation? Mr. McLaughlin? Didn't he put you up to calling me?”

And you said, “No; he told me not to talk to you at all.”

Mr. McLAUGHLIN: Now, Your Honor, you see how he gets all that in. The answer is “no”.

The COURT: Mr. McLaughlin, she was examined on direct examination concerning her conversation with Mr. Offutt, and I think that opens the door to cross-examination.

Mr. McLAUGHLIN: Yes, I appreciate that, but he goes into this long dissertation, and he is in effect testifying.

The COURT: He is in his legal rights.

By Mr. OFFUTT:

Q. (Continuing) Didn't that take place, that question, and answer by you?

A. I couldn't say exactly, it was such a long spiel, I can't remember exactly what you said.

Q. Do you deny that you said that, and I said that, at that time?

The COURT: She has answered your question.

By Mr. OFFUTT:

Q. And then didn't I say, "Then, why are you calling me back? Look, don't call me any more; stop bothering me, and just tell the truth on the stand. Where are you calling from?" And didn't you say, "A club on 14th Street." Didn't that take place?

A. May I say what you said in one long line, can I say what I said at the beginning of that?

I said, "I am not bothering you; I simply want to know why you did such-and-such"—you have forgotten that.

Q. You tell me what it was, if you say I have forgotten something that was in there.

Mr. McLAUGHLIN: I object to that; we are getting no place.

The COURT: I will let her answer.

A. When you asked me, "Why are you bothering me?", I said, "I am not bothering you; I have been trying to get you all day, and

I want to know why you brought my mother here; why you have been questioning my landlady; why you have been questioning all my friends." (Tr. 210-212.)

* * *

Q. When you left the doctor's office, on Monday, May 7th, how did you get away from the doctor's office to wherever you went, by taxicab?

A. I probably did.

Q. What is your recollection about it?

The COURT: I do not think it makes any difference whether she took a cab or bus or the streetcar.

Mr. OFFUTT: It has some relevancy, Your Honor, I assure you.

The COURT: Very well.

Do you remember whether it was a cab or some other means of transportation?

The WITNESS: I don't remember. It was either a cab or the trolley, I don't remember which.

By Mr. OFFUTT:

Q. Where did you go that time, to 2415 Pennsylvania Avenue?

A. Yes, sir.

Q. In between that time, after you left the doctor's office, you never contacted the doctor any more until this January matter, is that correct?

A. That is correct.

Q. When Mr. McLaughlin asked you about your health, and I am having that in mind now, between that date isn't it a fact that you went to Mount Alto Hospital?

Mr. McLAUGHLIN: I didn't ask her about her health at that time.

The COURT: Mr. Offutt, I am going to exclude the question. You may reframe the question, if you wish, and do not preface it with any remarks.

Mr. OFFUTT: Oh, yes, sir.

By Mr. OFFUTT:

Q. Isn't it a fact that in October or November you went to Mount Alto Hospital and had an operation for a kidney disorder—1951?

Mr. McLAUGHLIN: I object to this as being immaterial.

The COURT: Objection overruled.

Mr. McLAUGHLIN: The abortion wasn't until January.

The COURT: I am going to overrule the objection. Just answer yes or no.

The WITNESS: Will you repeat it, please?

Mr. McLAUGHLIN: I say, I don't think it is admissible, unless the defense was that the abortion was committed for the purpose of saving the life of this girl.

The COURT: I do not know what the defense is going to be.

Mr. McLAUGHLIN: I think we should know at this time in order to know whether the question is admissible.

The COURT: I do not think the defense is under any legal obligation to disclose the defense. I am going to allow it. It seems immaterial to me, but there is a possibility it may be material, and therefore I shall allow it.

Mr. McLAUGHLIN: That is, if the defense is that he committed it to save her life.

The COURT: I do not know what the defense is.

Mr. McLAUGHLIN: I say that is the only ground on which that would be admissible.

The COURT: I am going to allow this question.

Mr. McLAUGHLIN: All right, Your Honor.

Mr. OFFUTT: Read the question, please.

The REPORTER (Reading):

"Isn't it a fact that in October or November you went to Mount Alto Hospital and had an operation for a kidney disorder—1951?"

The COURT: You may answer the question. (Tr. 301-303.)

* * *

Mr. OFFUTT: May I approach the bench?

The COURT: Yes. Indeed.

(Thereupon, counsel approached the bench and conferred with the Court, in a low tone of voice, as follows:)

Mr. OFFUTT: If Your Honor please, this trouble, whatever I am having, is flaring up on me; I am having a session of going to the bath, and that is the principal trouble I have had all night.

The COURT: We will take a recess whenever it is necessary.

Mr. OFFUTT: I was afraid—I was ready to go just before you came in.

The COURT: Well, we will take a recess if it becomes necessary.

Mr. OFFUTT: All right.

The COURT: You let the Clerk know and the Clerk will notify me. (Tr. 327.)

* * *

Mr. OFFUTT: The other thing is the subpoena which I served on the District Attorney to release these statements and things of the witness Ott, I have never had a report on that.

The COURT: Just a moment. I will direct this—I always do this, irrespective of any subpoena—I will let the defense counsel examine any statements made by the witness on the stand in order that he may confront her with any contradictory statements, if there are any.

Now as to statements of any other witnesses, I will not direct their production.

In other words, if you have a written statement made by the witness Ott, I think the defense counsel is entitled to see it.

Mr. McLAUGHLIN: Of course, that is not the

law, but I appreciate—the law does say the Court has discretion.

The COURT: I think the law is that the Court has discretion.

Mr. McLAUGHLIN: The final discretion under certain circumstances, yes.

The COURT: Yes. Suppose her story on the witness stand is different from her story in her statement, I think in the interest of justice counsel for defense should have a right to see that.

Mr. McLAUGHLIN: I understand the law is that if he has any information that they are, he might refer to the statement for the purpose of contradicting her.

The COURT: But how could he get that information without getting the statement first?

Mr. McLAUGHLIN: I don't know.

The COURT: I think it is in the interest of justice. Now, I will never direct a disclosure of any statement of any witness other than the witness on the witness stand.

I made that ruling in the Manfredonia case two weeks ago, where there was a request for the production of all statements of witnesses, and I denied that.

I said, however, whenever a witness takes the witness stand I will direct the production of that particular witness' statement in order that they may be used for the purpose of cross-examination, and Mr. Ireland, who personally argued the matter, acquiesced in that.

Mr. McLAUGHLIN: Will Your Honor admit the statement in evidence?

The COURT: I will not admit the statement in evidence, no. All I am going to do is this, to ask you to let Mr. Offutt read the statement, and he can use it for the purpose of cross-examining the witness. However, you may use it only for the purpose of confronting her with any part of that statement that may be contradictory of anything that she says on the witness stand, provided there is any contradiction.

Mr. McLAUGHLIN: This is only in court, now; he can't take the statement out of court.

The COURT: Oh, no.

Mr. OFFUTT: No, I don't want that.

The COURT: You will have to read it in the courtroom.

Mr. OFFUTT: And this includes any statements she has made, doesn't it, Your Honor?

The COURT: It includes all written statements that you may have, Mr. McLaughlin, made by this witness, in your possession or in your control. That means in your personal possession or in the possession of the Police Department, which are in your control.

You see the reason for not allowing a search of statements generally is that it may result in a miscarriage of justice because it may lead to concoction or fabrication of false testimony; but that argument does not apply when the

witness is on the witness stand, and only that particular witness' statement is being disclosed. (Tr. 329-331).

(4) June 4 to 16, 1952

Rulings similar to the above were made by Judge Holtzoff in favor of petitioner on numerous occasions throughout the trial (e.g. Tr. 722, 736, 802, 896, 903-904, 912, 1184, 1416, 1421, 1422-1423, 1435, 1506, 1508). Even after petitioner had succeeded in provoking the court into using sharp language in rebuking petitioner, the court continued to make rulings favorable to him whenever the occasion warranted. The following is an example when, on June 9, 1952, petitioner was examining William E. Jones, a witness called by him, who had admitted having been intimate with Mrs. Ott and having caused the pregnancy involved in the second abortion (Tr. 959-964):

By Mr. OFFUTT:

Q. Did you ever give anybody a statement in this case before you were called here as a witness?

Mr. McLAUGHLIN: I object to this, Your Honor. I do not see the materiality.

The COURT: Objection overruled.

Mr. McLAUGHLIN: It is his own witness, Your Honor.

The COURT: Have you any written statement from this witness, Mr. McLaughlin?

Mr. McLAUGHLIN: Yes, I have a statement from him, Your Honor.

The COURT: Well, I think that answers the question.

Mr. OFFUTT: I have a subpoena out. May I see that statement, Your Honor? I have a subpoena out for it.

Mr. McLAUGHLIN: What is he trying to do? I don't understand the purpose of it, Your Honor. This is his own witness.

The COURT: Beg pardon?

Mr. McLAUGHLIN: This is not a witness of mine. This is a witness of his.

The COURT: Yes, I understand, but I think under the circumstances I am going to rule that Mr. Offutt has the right to see the statement.

Mr. OFFUTT: Your Honor, while he is looking for the statement, I overlooked——

The COURT: You may look at the statement, if you wish.

Mr. OFFUTT: I say, while he is looking for it, I overlooked one thing, this record here, which was not offered here today.

The COURT: Very well.

Mr. OFFUTT: The record of the jail which shows the visits. I overlooked offering that the other day because Mr. Bernot was here, and I just noticed it is here, the record of the visits to the hospital.

The COURT: I suggest you finish with this

witness first so we will have a continuous record.

Mr. OFFUTT: All right, sir.

May I look at this just a moment?

The COURT: Yes.

Gentlemen, I suggest you come to the bench.

(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice, as follows:)

The COURT: I made my ruling on the basis of the thought that this witness may be regarded as a hostile witness or a reluctant witness.

Under the rule of the Bedell case, if there is any contradiction between his oral testimony and the written statement, that written statement may be used to refresh his recollection, and only for that purpose.

Mr. McLAUGHLIN: Yes, sir.

The COURT: You recall the Bedell case?

Mr. McLAUGHLIN: Yes.

The COURT: You may go back to the counsel table. You may read the statement before you proceed, if you wish.

Mr. OFFUTT: I just want to ask something else.

The COURT: Mr. McLAUGHLIN, come back.

Mr. McLAUGHLIN: Yes, sir.

Mr. OFFUTT: In this statement, I will just use it under the limited thing, Your Honor, as to show any contradictions, that is all.

The COURT: Well, now, not quite that way.

Mr. OFFUTT: Is that right?

The COURT: He is your witness.

Mr. OFFUTT: Yes, I see.

The COURT: If there is any contradictory statement, you may use the statement for the purpose of trying to refresh the witness' recollection.

Mr. OFFUTT: Oh, yes.

The COURT: Now, if it does not refresh his recollection, then the statement itself is not admissible in evidence.

Mr. OFFUTT: That is what I meant, Your Honor.

The COURT: Yes.

Mr. OFFUTT: There is one other thing, so I will be clear in Your Honor's ruling. I don't want to call this next witness unless I understand Your Honor's position on it.

As I understood Your Honor and, if I am wrong, I wish Your Honor would clear me up on it, in connection with the telephone call that was made by me to Mary Lee Ott on this Sunday, May 25—that is the Sunday before he started the case, that is a week before he started—did Your Honor rule that if anyone listened in on the conversation, they would be permitted to testify?

The COURT: I have not ruled.

Mr. OFFUTT: Oh, that is what I would like to know.

The COURT: I have not made a ruling on that.

Mr. OFFUTT: Would Your Honor tell me your position on that?

The COURT: I don't know. I am not going to rule in advance of any witness being called.

Mr. OFFUTT: I thought Your Honor said, and if I misunderstood you—I must have misunderstood you.

The COURT: I did say that there may be a question as to whether this violates the Communications Act. I made no ruling on it. All I said was there may be a question.

Mr. OFFUTT: I thought Your Honor said it was a violation.

The COURT: I don't think so.

Mr. OFFUTT: I found it in the record, so then it must be an error.

The COURT: If the record says so——

Mr. OFFUTT: Yes, it does say it.

The COURT: I did not make a binding ruling on that.

Mr. OFFUTT: Yes, sir.

The COURT: I don't make rulings in advance of testimony being offered in the proper form.

Mr. OFFUTT: Yes, sir.

The COURT: There are reasons for not doing that.

Mr. OFFUTT: Your Honor, in the Lewis case, United States v. Lewis, that numbers case—and I think the Belecci [sic] case, I understood Your Honor, in reading it, that Your Honor had taken the position that if the person having a conversation with another person, either

one of those two parties to the conversation gave permission to someone—that that was all *right*.

The COURT: I recall that.

Mr. OFFUTT: But, if the conversation was intercepted by wire tapping or something like that, that was a violation.

Is that Your Honor's position?

The COURT: I made that ruling and, of course, that is my view of the law.

Mr. OFFUTT: Yes, sir, that is what I was relying on, Your Honor.

The COURT: Yes, you may rely on that. I don't often change my mind. Sometimes I do.

Mr. OFFUTT: Thank you very much, Your Honor.

The COURT: Yes.

(Counsel returned to the trial table.)

The COURT: Mr. Offutt, I suggest that you defer reading the statement until the luncheon recess.

Mr. OFFUTT: All right.

The COURT: Now, if you are otherwise through with this witness, you can go on with another witness, and then, after reading the statement, if you want to call this witness I will permit you to do so.

Mr. OFFUTT: All right, I will do that, Your Honor.

Further examples of the trial judge's liberal manner of dealing with petitioner whenever he was

properly developing relevant testimony are shown by reading the entire direct examination permitted when petitioner was examining (a) defendant Peckham, who testified in his own defense (Tr. 1228-1364) and (b) Dr. Tully, who provided defendant with certain alibi testimony (Tr. 980-992).

Another good example of the handling of the trial on those occasions when petitioner was desisting from his highly provocative conduct and tactics, is shown by the transcript of the proceedings during petitioner's argument for a directed verdict on June 13, when the trial was nearly over (Tr. 1761-1777).

GOVERNMENT APPENDIX B

FURTHER DETAILS RESPECTING PETITIONER'S CONTEMPT

A number of examples of petitioner's improper and provoking conduct have been set forth in the Government's brief at pages 12-24, *supra*. Some additional examples are set forth below.

(1) *June 5, 1952*

The following incident took place early on June 5 (Tr. 591-592; see R. 130-131):

By Mr. OFFUTT:

Q. By the way, Doctor, do you recognize Mr. Spriggs here sitting in the front row?

A. Yes.

The COURT: Go ahead.

Mr. OFFUTT: Oh. Your Honor, when you move like that it startles me and disturbs me——

Mr. McLAUGHLIN: Oh, I object to this.

Mr. OFFUTT (continuing):—I know you don't intend to do it.

The COURT: You mean that when I shift in my chair that disturbs you?

Mr. OFFUTT: When you jump from the seat up to the desk, it does, because most of the time you reprimand me or stop me, and I am very much upset and nervous about this.

The COURT: Don't be absurd, Mr. Offutt.

Mr. OFFUTT: I am not absurd, Your Honor, I assure you.

The COURT: Don't be absurd.

Mr. OFFUTT: I am not absurd, Your Honor, that is my feeling.

The COURT: Unless you proceed with this cross examination I shall excuse the witness.

Mr. OFFUTT: If you will just be patient with me, Your Honor.

The COURT: No; you tax my patience.

Mr. OFFUTT: Why, Your Honor? Will you please tell me?

Mr. McLAUGHLIN: I object to this, Your Honor.

Mr. OFFUTT: I am trying to do my best.

The COURT: Unless the next utterance that comes from your lips is a question addressed to this witness I will excuse this witness.

(2) *June 6, 1952*

When Mrs. Hodges, the mother of Mary Ott, had been called as a witness, on June 4, petitioner objected to Mrs. Ott's presence in the court room. The Court explained that witnesses were excluded only before they testified (R. 77; Tr. 416-417). During the cross-examination of Mrs. Hodges, petitioner again made a point of Mrs. Ott's presence in the court room (R. 88; Tr. 431-432). On the afternoon of June 5, the prosecuting attorney notified the court that petitioner had served a subpoena on Mrs. Ott, and the court ruled that petitioner was within his rights (R. 147; Tr. 673). Petitioner then asked that the witness be excluded from the court room, but the court ruled that it excluded only those witnesses known to be such at the beginning of the trial and explained that the matter was not one of law but of local practice in the discretion of the court (Tr. 673-675).

On June 6, petitioner again objected to Mrs. Ott's presence in the court room (R. 161; Tr. 790). The following occurred (R. 161-162; Tr. 791):

The COURT: After her testimony is concluded, she can sit any place she likes. Any witness who has testified may remain in the courtroom as a spectator, and the mere fact the witness may be called for rebuttal is no reason for the Court not permitting the witness to remain. We were over that yesterday, Mr. Offutt. Please don't repeat it.

Mr. OFFUTT: I object to the long speeches

about it, your Honor; I just made an objection and I asked your Honor to rule on it, that's all.

The COURT: You object to what?

Mr. OFFUTT: I object to——

The COURT: You object to what?

Mr. OFFUTT: I object to the long dissertation about it. I made no argument; your Honor has not permitted me to make any argument, and I merely object to Mr. McLaughlin——

The COURT: I think you are getting very discourteous to the Court.

(3) *June 10, 1952*

The following is the complete transcript of the episode referred to in the Government's brief at pages 23-24, *supra*. Petitioner had requested and had been granted permission to come to the bench for a conference with the judge, when the following occurred (Tr. 1078-1083; see R. 213-215):

Mr. OFFUTT: If Your Honor please, I want to ask this witness about some things in his statement, which I have just learned by seeing it, that were not covered in the direct examination, except to this extent, when he referred to the fact that, as I recall it, that he had known her for several years.

The COURT: I shall not make any ruling unless the question is before me.

Just specifically what question do you want to ask, and if you will tell me that I shall in-

dicade whether I shall permit the question to be asked.

Mr. OFFUTT: I want to ask him if it is a fact that he went around with this lady, Mrs. Mary Lee Ott, when he was out at the Bethesda Hospital, in 1950, in March and April, and at least once or twice a week while she was living with the man in her common law marriage, named Christ, who is Mr. Christenson, and that——

The COURT: I shall exclude that.

Mr. McLAUGHLIN: I object to that, Your Honor.

The COURT: Just a moment.

Mr. OFFUTT: I thought you were going to let me finish.

The COURT: I thought you had finished that one question.

Mr. OFFUTT: I was going to include these other things in the same question.

Mr. McLAUGHLIN: I think he ought to ask all the questions down there.

The COURT: I am going to exclude that question as obviously irrelevant, and I also wish to add, for the purpose of the record, that is nothing but an attempt to smear and throw mud at the witnesses in this case, without any justification, and in an irrelevant matter.

Of course, if an issue is relevant, and results in mud being thrown, that is permissible, but to throw mud at a person on an absolutely ir-

relevant matter, merely because he is a witness, is not permissible.

Mr. OFFUTT: I respectfully urge that the credibility of the witness Ott is very much in issue.

The COURT: In the first place, he is your witness, and in the second place, even if he were an adverse witness, the cross-examination as to credibility may not extend that far.

Mr. OFFUTT: I am not cross-examining him. This is my witness, Your Honor.

The COURT: Then certainly you may not examine him.

Mr. OFFUTT: Not his credibility, but the credibility of the witness Ott. Your Honor didn't hear me; that's what I have been urging all the time in this case, and you have been talking about the witness.

The COURT: You should know enough law to know that you can examine a witness as to that witness' credibility, but you may not examine, for example, Witness A for the purpose of affecting the credibility of Witness B. You can only cross-examine B as to his own credibility.

Mr. OFFUTT: I urge that is not the statement of the law; that I can examine Witness A to show that the credibility of Witness B—

The COURT: I have made my ruling. If I am wrong then you have a remedy in the Court of Appeals.

Mr. OFFUTT: May I make the proffer at this time?

The COURT: No, you may not.

Mr. OFFUTT: So that the record will be complete in the Court of Appeals, if we need to go there——

The COURT: No, I have already made my ruling.

I was just reading an opinion of Justice Jackson. He says that it is not permissible for a lawyer to continue arguing after the Court has ruled.

Mr. OFFUTT: That is the reason I objected to Mr. McLaughlin several times, Your Honor.

The COURT: Now, you take care of your own conduct and Mr. McLaughlin will take care of his. I think if your conduct were as good as Mr. McLaughlin's I would give you a medal.

Mr. OFFUTT: I object to it because when I have objected to it, I have to object to it, and I am able to show you many places in the record where Mr. McLaughlin has continued talking and I have objected to it.

The COURT: The next time when I make a ruling I don't want any response from you.

Mr. OFFUTT: I beg your pardon.

Mr. McLAUGHLIN: Let's have the questions asked from down at the counsel table.

The COURT: You may go back to counsel table and proceed with the examination of the witness.

Mr. OFFUTT: May I have an objection?

The COURT: Go back to the counsel table.

Mr. McLAUGHLIN: May I say that the defense attorney——

The COURT: Go back to counsel table.

Mr. OFFUTT: I object to your putting your hand up like that——

The COURT: ~~Go back to counsel table.~~ Stop, or I will have the Marshal pull you back to your seat.

Mr. McLAUGHLIN: May I say for the record that this attorney has abused Your Honor's privilege of asking to come to the bench.

(Whereupon, counsel resumed their places at the trial table and the following proceedings were had in open court:)

Mr. OFFUTT: If the Court please, I respectfully move Your Honor for a mistrial and——

The COURT: Motion denied.

Mr. OFFUTT (Continuing):—and I want to put the proffer on the record at this time——

The COURT: Motion denied.

Mr. OFFUTT: And I want the record to show that Your Honor raised your hand——

The COURT: Motion denied.

Mr. OFFUTT (Continuing):—and ordered me back from the bench.

The COURT: Motion denied. Proceed.

Mr. OFFUTT: I object to Your Honor yelling at me and raising your voice like that.

The COURT: Just a moment. If you say

another word I will have the Marshal stick a gag in your mouth.

You proceed with the examination of the witness. Proceed.

Mr. OFFUTT: If Your Honor please, I can't continue like this——

The COURT: I direct you to continue.

Mr. OFFUTT: (Continuing)—with Your Honor yelling at me and Your Honor threatening me with punishment for contempt for objecting, as I have a right to do, in accordance with the Lewis case.

The COURT: You may proceed.

Mr. OFFUTT: I insist on being permitted to object and make my motions when Your Honor's conduct justifies it.

The COURT: You have made your motion and I have ruled, and you will desist from speaking after I have ruled on your motion.

Mr. OFFUTT: But then you did something——

The COURT: Proceed with the examination of this witness.